SZEGEDI TUDOMÁNYEGYETEM
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THE WORD IS A DANGEROUS WEAPON: JURISDICTION, APPLICABLE LAW AND PERSONALITY RIGHTS IN EU LAW – MISSED AND NEW OPPORTUNITIES

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Published in 8(2) Journal of Private International Law 251-296 (2012)
The numbers inserted in the text refer to the page-numbers in the above publication.

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Electronic copy available at: https://ssrn.com/abstract=2231949

8(2) Journal of Private International Law 251-296 (2012)

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A. INTRODUCTION

Nowadays, personality rights are, perhaps, one of the most contentious domains of EU private international law. In relation to jurisdiction, the Court of Justice of the European Union's (CJEU) recent judgment in *eDate/Martinez* comprehensively revised the case-law as regards the online world. As to the question of applicable law, the Rome II Regulation is, currently, not applicable to matters related to privacy and personality rights but it provides for the revision of this exclusion. In 2009, by the Commission's order, a comparative study was prepared on the situation in Europe,[1] and there is a lively scholarly discourse on the issue.[2] The CJEU's judgment in *eDate/Martinez* intruded into this distinguished scholarly dialogue and seems to have cut the Gordian knot: it tried to do away with the knot without carefully disentangling it.

The present paper is meant to contribute to this scholarly debate, analyzing the jurisdictional and choice-of-law problems of libel suits in Europe and submitting proposals. Although the notion of 'privacy and personality rights' is wider than libel and defamation matters, and it may also cover, by way of example, the right to human dignity, bodily integrity, protection of private *252 communication and equal treatment, the scope of this paper is restricted to 'communication delicts'.

Both jurisdiction and applicable law are covered, due to their interpenetration. Their intrinsic divergence is not disregarded: special rules of jurisdiction are justified by procedural expediency; hence, the plaintiff has no normative right to rely on them. On the other hand, the purpose of choice-of-law rules is to bind the matter with the law it is most closely connected to.

The scholarship is replete with pieces on the US to England libel tourism[3] (and, as perceived by some, with the England to US libel terrorism).[4] The present paper is not meant

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[1] *Comparative study on the situation in the 27 Member States as regards the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality.* (JLS/2007/C4/028. Final Report) (hereafter: Comparative study)

[2] See e.g. the online symposium of the ConflictofLaws.net on Rome II and defamation: http://conflictoflaws.net/2010/rome-ii-and-defamation-online-symposium

[3] See e.g. A Eardley, "Libel tourism in England: now the welcome is even warmer", (2006) 17 *Entertainment Law Review* 35.; A Bell, "Libel tourism: international forum shopping for defamation claims" (*Global Law Forum*, Jerusalem Center for Public Affairs 2008): http://www.globallawforum.org/UserFiles/puzzle22New%281%29.pdf; R Garnett & M Richardson, "Libel

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to enlarge this queue but it takes a European perspective, focusing mainly (but not exclusively) on the intra-EU cases and on EU law.[5] Naturally, global experiences are utilized as far as necessary and possible.

As regards jurisdiction, the following is submitted. First, online and non-online (printed media, broadcasting) communication delicts are, on the level of principle, to be treated alike. Second, the mosaic theory established in *Shevill* and confirmed in *eDate/Martinez* should be maintained but confined to filter out cases where there is no close connection between the dispute and the forum. The legal test should not be restricted to the bare fact of publication but it should also extend to the question of reputation (is the victim known here?) provided that the level of circulation is, in absolute terms, low here. In case of online contents, contrary to the CJEU's ruling in *eDate/Martinez*, actual accesses (number of visitors, downloads etc.) and not accessibility should be the surrogate of circulation. Third, the 'centre of interests' doctrine introduced by the CJEU in *eDate/Martinez* should be overruled. Fourth, if the victim has a strong reputation in a country belonging to the publication's main direction, the loss in a side-effect country needs to be substantial to establish jurisdiction (allegation of some harm should not suffice). The fifth proposal is that if the parties ***253** are domiciled in the same country, the purpose of preventing the abuse of the jurisdictional rules warrants that other Member States should have jurisdiction only if substantial harm occurred there.

As regards the question of applicable law, the following is submitted. The law of the country coming under the publication's main 'direction' shall be applicable to the injury suffered there. The application of the law of a side-effect country is justified only if the harm sustained there is substantial. Since the extent of the harm is a question to be answered on the basis of the applicable substantive law, two factors are to be examined: the publication's circulation and the victim's reputation. If the former is significant, the application of this law is warranted; if it is modest but the victim's reputation is significant there, the application of this law is also warranted. It is to be presumed that the alleged harm is substantial in the country where the victim has his habitual residence.

B. JURISDICTION OVER COMMUNICATION DELICTS

1. Jurisdiction over communication delicts under the Brussels I Regulation

Under the Brussels I Regulation, jurisdiction regarding claims related to the breach of privacy and personality rights can essentially be founded on two bases. First, the alleged wrongdoer can be sued on the basis of general jurisdiction: "persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."[6] Second, the jurisdiction of the court may be based on Article 5(3) of the Brussels I Regulation, which is

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tourism or just redress? Reconciling the (English) right to reputation with the (American) right to free speech in cross-border libel cases" (2009) 5 *Journal of Private International Law* 471; RL McFarland, "Please Do Not Publish this Article in England: A Jurisdictional Response to Libel Tourism" (November 28, 2009). 29-38. Published in (2010) 79(3) *Mississippi Law Journal* 617. Available at SSRN: http://ssrn.com/abstract=1514988; R Balin, L Handman & E Reid, "Libel tourism and the duke's manservant" (2009) (3) *European Human Rights Law Review* 303; L Levi, "The Problem of Trans-National Libel" (March 25, 2011). *University of Miami Legal Studies Research Paper No. 2011-11*. 10-26. Forthcoming in the *American Journal of Comparative Law*. Available at SSRN: http://ssrn.com/abstract=1795237. On the differences between English and US libel law see e.g. UN Raifeartaigh, "Fault issues and libel law – a comparison between Irish, English and United States law" (1991) 40 *International and Comparative Law Quarterly* 763.

[4] See e.g. New York's Libel Terrorism Protection Act, 2008 N.Y. Laws 66.

[5] Of course, without disregarding that the Rome II Regulation has universal application and the Brussels I Regulation is, in principle, applicable to proceedings instituted by a non-EU plaintiff against an EU domiciliary.

[6] Article 2.

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applicable in matters relating to tort, delict or quasi-delict and confers jurisdiction on "the courts for the place where the harmful event occurred or may occur". The notion of 'tort, delict or quasi-delict' has been interpreted in the case-law of the CJEU rather broadly. The basic definition was established in *Kalfelis v Schröder*, where the CJEU held that "the concept of 'matters relating to tort, delict and quasi-delict' covers all actions which seek to establish the liability of a defendant and which are not related to a 'contract' within the meaning of Article 5(1)."[7] In other words, the notion of 'tort, delict or quasi-delict' is established negatively, through the notion of contract. The concept of contract covers situations where there are obligations "freely assumed by one party towards another".[8] Accordingly, the basic notion of 'tort, delict or quasi-delict' ***254** has two elements: there are no obligations freely assumed by one party towards the other and the action seeks to establish the liability of the defendant. Claims based on the breach of privacy and personality rights meet both requirements: there are no freely assumed obligations and the purpose of the claim is to establish the liability of the defendant.

The second element (purpose of establishing the defendant's liability) has been interpreted broadly, embracing situations where the damage has not occurred yet but there is a risk of damage and the action relates somehow to its prevention. This element also embraces situations where the plaintiff is seeking an injunction against the defendant's illegal conduct with the purpose of preventing the emergence of damages in a wide sense. Thus, Article 5(3) is applicable not only to claims for monetary recovery but also to declarations of illegality and injunctions; similarly, it also embraces claims that aim at the prevention of the appearance of a publication or its removal even before any loss would have emerged.[9] In consonance with this, the CJEU's recent judgment in *eDate/Martinez* speaks about 'actions for liability', which include both actions for damages and actions for injunction.[10]

The interpretation of the term 'place of the harmful event' is central to the application of Article 5(3) of the Brussels I Regulation. Nevertheless, the construction of this concept is dubious since, as held by the CJEU, it refers to the whole line of causally interrelated events, starting with the *delictum* (conduct or omission) giving rise to the loss and ending with the *damnum* (injury) representing all the detrimental consequences emerging from the delict. This has considerable consequences in case of distance delicts (e.g. certain instances of violations of privacy or personality rights).

This principle was established by the CJEU in *Mines de Potasse d'Alsace*,[11] which involved a pollution matter: a mine in Alsace polluted the water of the ***255** Rhine, thus

[7] Para 17.

[8] See e.g. Case C-26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967, para 15.

[9] In Case C-18/02 *Danmarks Rederiforening v SEKO* [2004] ECR I-1417, the plaintiff instituted a law-suit against a trade union to establish the illegality of an industrial action. The CJEU held that this case came under the notion of 'tort, delict or quasi-delict' of Article 5(3) of the Brussels I Regulation (para 28) because it was "seeking to prevent the occurrence of future damage"[9], i.e. the action at stake had some connection to damages because there was a reasonable potential that damages may emerge. In Case C-167/00 *Verein für Konsumenteninformation v Karl Heinz Henkel* [2002] ECR I-8111, a consumer protection organisation brought a preventive action with the purpose of deterring a trader from using terms considered to be unfair in contracts with private individuals. Likewise, the CJEU held that such an action comes under the concept of 'tort, delict or quasi-delict' (para 50). The CJEU explained that the notion of 'harmful event' "covers not only situations where an individual has personally sustained damage but also, in particular, the undermining of legal stability by the use of unfair terms which it is the task of associations such as the VKI to prevent." (para 42).

[10] Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez, Robert Martinez v MGN Limited*, judgment of 25 October 2011, paras 51-52 and answer to question 1. See also Advocate General Villalón's Opinion in Joined Cases C-509/09 and C-161/10 *eDate Advertising GmbH v X and Olivier Martinez, Robert Martinez v MGN Limited*, opinion of 29 March 2011, para 29.

[11] Case 21/76 *Bier BV v Mines de Potasse d'Alsace* [1976] ECR 1735.

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damaging a nursery-garden in the Netherlands; a typical distance delict.[12] The CJEU held that, due to the close causal links between them, it would be senseless to choose between the *delictum* and the *damnum* and, hence, it brought both of them under the notion of the 'place of the harmful event'. The consequence of this approach is that the plaintiff can sue at both places.[13] This notion is in conformity with national jurisdictional rules as well.[14]

The direction opened in *Mines de Potasse d'Alsace* raised several questions of interpretation. If the notion of 'harmful event' is restricted neither to the delict, nor to the injury, how far should we go along the causal line? Are all detrimental effects caused by the delict relevant from the point of view of the jurisdictional rules? For instance, do Hungarian courts have jurisdiction if a paper published in England but not distributed in Hungary contains false factual allegations concerning a Hungarian person, and the false allegation is, in turn, read by some Hungarians who travel from London to Budapest? Or even more radically: can it be argued that false allegations made anywhere in the EU cause loss to the reputation of the victim in all Member States due to the fact that the allegations spread from mouth to mouth and reach different countries? Or, more realistically, how to interpret the law if an allegation made in a French newspaper published in France (and not distributed in Hungary) is read by a Hungarian journalist spending some days in France, and the Hungarian journalist refers to the French newspaper's allegation in one of his articles in Hungary.

In *Dumez France SA and Tracoba SARL v Hessische Landesbank and others*[15], a non-libel case, the CJEU established that only the delict's direct consequences can be regarded as loss when locating the place of the harmful event under Article 5(3). The French parent company of certain German subsidiaries sued some German banks in France because they suspended the disbursement of a loan to certain contractors in a construction development project, which, in turn, stopped the project and, as a corollary, the sub-contractors, including the subsidiaries of the French parent, went bankrupt. Here, the elements of the causal chain were the following: suspension of the loan to the contractor, stoppage of the construction development project, bankruptcy of the sub-contractors, loss suffered by the parents of the sub-contractors. The CJEU held that the arguments of the French parent companies went too far: although the concept of 'harmful event' embraces both the place of the delict and the place where the loss was suffered, the latter is confined to the place where the delict took ***256** its direct effects against the direct victim.[16] Although this case did not concern privacy and personality rights, it provides some guidance on how to cut the chain of causality.

A similar approach was taken by the CJEU in *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company*[17], which touched upon issues of privacy and personality rights (although not from a libel perspective). Mr. Marinari wanted to discount bills of exchange in a Lloyds Bank's branch in Manchester. However, the bank considered the bills of exchange to be of dubious origin and informed the police about its concerns. Furthermore, it refused to return them. Mr. Marinari was arrested by the police but discharged afterwards. Subsequently, Mr. Marinari sued the bank for damages in Italy. He claimed the payment of the value of the bills of exchange and non-monetary damages that ensued primarily due to the inconvenience caused by the arrest and due to the damage to his reputation. The Italian *Corte Suprema di Cassazione* submitted a reference to the CJEU.

The CJEU held that the plaintiff's freedom of choice cannot be extended beyond the circumstances underlying the very existence of this freedom of choice. The rule that the

[12] The defendant was also sued by a foundation for the protection of the water of the river as secondary plaintiff.
[13] Paras 5-23.
[14] Paras 22-23.
[15] Case C-220/88 *Dumez France SA and Tracoba SARL v Hessische Landesbank and others* [1990] ECR I-49.
[16] Para 20.
[17] C-364/93 *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* [1995] ECR I-2719.

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plaintiff can sue both in the country of the delict and in the country where the damages occurred (i.e. the term 'harmful event' embraces both places) is justified by the fact that both places are similarly closely connected to the matter.[18] An excessive interpretation would be contrary to the fundamental principle of the Brussels I Regulation to exclude exorbitant plaintiff-favouring jurisdictional rules.[19] Namely, if the notion of 'harmful event' is interpreted excessively and it embraces all places where the conduct's negative consequences can be perceived, even if indirectly, this would lead to the forum that is most favourable to the plaintiff, i.e. the country of the plaintiff's domicile. The injured person normally has property and reputation in his country of domicile, so the conduct always entails some negative consequences in this Member State.

Though not addressing the issue expressly, the CJEU seems to have made clear in its judgment that 'hearsay' has normally no relevance under Article 5(3) of the Brussels Regulation.[20] Nevertheless, it is questionable whether the same analysis had applied if Mr. Marinari had referred to specific damages (e.g. loss of the confidence of a business partner or the faith of a wife) instead of a mere reference to his reputation's injury in general.

***257** For 16 years, the case-law on privacy and personality violations was essentially determined by *Shevill and Others*[21]. Here, a French newspaper (*France-Soir*) published an article accusing an English person (a student) of money laundering. The injured person was working in France when the alleged wrong occurred but returned subsequently to England (the stay in France lasted only three months) where she instituted a proceeding. The *France-Soir* was primarily marketed in France; nevertheless, it also had some circulation in several other countries.[22]

In short: the newspaper was predominantly distributed in France (94% of the circulation, 237,000 out of 252,000 copies) and the allegedly blackened plaintiff was an English domiciliary (the three months stay in France was, in all likelihood, only a very slight connection that should essentially be disregarded), where the newspaper achieved 0.00091 % of its circulation (230 copies).[23]

The jurisdictional question was whether all Member States where the newspaper has some circulation have jurisdiction taking into account that the damages are the consequence of the article's alleged breach of the plaintiff's reputation and, hence, damages emerge in all countries where the periodical is read. This thinking would excessively expand the number of courts with jurisdiction but actually this is what was said by the CJEU.

The CJEU proceeded from the starting-point that since the *raison d'être* of the special rules of jurisdiction is that there is a close relationship between the legal dispute and the court hearing the case,[24] this cannot imply that all courts where someone read the incriminating article would have jurisdiction over all the damages suffered by the defendant throughout the globe. Afterwards, the Court identified the place of the delict and the place of *damnum*. The former is the place where the publisher[25] is located, since this is the place where the causal chain leading to the loss started and eventuated in the alleged violation of the plaintiff's

[18] Paras 11-12.
[19] Paras 13-15.
[20] See the above example of a Hungarian journalist reading a French newspaper in France and taking over its content.
[21] Case C-68/93 *Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA*, [1995] ECR I-415.
[22] Paras 2-3 and 9.
[23] Para 9.
[24] Para 19.
[25] Though the above case concerned the printed media, the term 'publisher', for the sake of simplicity, will be used widely, as a surrogate for all content providers (printed press, broadcasters, websites etc.).

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reputation.[26] As far as the place where the damages occurred is concerned, the CJEU came to the conclusion that loss emerges in each and every country where the newspaper is distributed. Nevertheless, in this case the court's jurisdiction is confined to the damages that occurred in that Member State.[27] The plaintiff may sue in the country where the publisher is located or ***258** in the countries where the newspaper is distributed; however, in the latter case she would have to parcel out her claim for damages.[28]

The judgment contains a peculiar twist in respect of whether mere publication is sufficient for establishing jurisdiction. In paragraph 29 it is said that in international libel matters "the injury (…) occurs in the places where the publication is distributed, when the victim is known in those places." That is, the pre-conditions of jurisdiction are twofold: distribution of the publication and some reputation ("is known in those places"). Nevertheless, the judgment's language subsequently lost the second condition; in paragraph 30 the CJEU stated that "[i]t follows that the courts of each Contracting State in which the defamatory publication was distributed and in which the victim claims to have suffered injury to his reputation have jurisdiction to rule on the injury caused in that State to the victim's reputation." Accordingly, distribution suffices; the phrase that "the victim claims to have suffered injury" seems to be redundant: the purport of libel suits is that the victim submits such a claim. This language is repeated in paragraphs 31 and 33, and in the judgment's operative part (answer to question one); all in all, this seems to be the 'final version' and appears to be logical in certain sense: what if it is the publication that makes the victim known (well-known)? E.g. someone acquires a person's pictures on his honeymoon and sells them in another country, where they become fairly popular. This is, nevertheless, only the textual interpretation of *Shevill*. Note that according to the fact pattern (as described in the judgment) the alleged victim was only slightly known in France (stay of three months) and all the reputation she had was 'located' in England. In this case it seems to be needless to place too much weight on the question of reputation: if the victim was not known in England, she was not known anywhere.

The requirement of 'reputation' was examined also in *eDate/Martinez*, without clearing the doubts of whether this requirement is, in fact, part of the legal test. The Advocate General's Opinion takes this for granted and cites paragraph 29 of *Shevill*.[29] On the other hand, in the conclusion, it submits that the allegation of an attack against one's reputation may be sufficient.[30] Furthermore, the language of the ECJ's judgment also ignores the requirement of 'reputation'.[31]

Nevertheless, would the CJEU have ruled in the same way if Shevill had sued in Spain or Ireland (it is assumed that some copies of *France-Soir* were sold here as well and that the victim was completely unknown here)? Perhaps, the phrase "when the victim is known in that place" would not have been lost during the judgment. Likewise, it is doubtful whether the CJEU would have ***259** been so quick in establishing the jurisdiction of the country where the newspaper is distributed if the publisher had sued the victim in Spain for a declaratory judgment, seeking to establish that the publication was not libellous.[32]

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[26] Para 24.
[27] Paras 29-30.
[28] Para 33.
[29] Para 35.
[30] Para 82.
[31] Para 51. See also para 52 and the CJEU's answer to the first question.
[32] Cf. T C Hartley, "Case Comment: Article 5(3) of the Brussels Convention", (1992) 17 *European Law Review* 274, 275 ("It is true that Ms Shevill was domiciled in England; however, the French company for which she worked was also allowed to bring proceedings, even though it was not domiciled in England."); G Hogan, "The Brussels Convention, forum non conveniens and the connecting factors problem", (1995) 20 *European Law Review* 471, 493 (Predicting that after *Shevill*, on the basis of the mosaic theory, "[t]he Court of Justice would

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In sum, the language of *Shevill* is very vague; however, taking into account the peculiarities of the fact pattern, it is questionable whether the *ratio decidendi* is similarly vague and the plaintiff can sue in any country where some copies of the publication were distributed.

After 16 years, in *eDate/Martinez*[33], the CJEU had the opportunity both to clarify and confine the *Shevill* case-law, and to adapt it to the online world. Unfortunately, this opportunity was missed: the CJEU's judgment left *Shevill* essentially intact and, through the introduction of the 'centre of interests' doctrine, disconcerted the delicate balance reached in *Shevill*. Essentially, the CJEU's judgment contributed to the case-law on jurisdiction with two holdings: first, the mosaic theory of *Shevill* is applicable also to online matters, and here the surrogate of 'distribution' is mere 'accessibility'; and, second, contrary to *Shevill*, a person injured by an online communication delict may bring before the court of his 'centre of interests' the entire claim for damages.

The case was the consolidation of two matters. In *eDate*, the plaintiff (a German convict, at that time free on parole) sued an Austrian website, which displayed information about the plaintiff, identifying him and stating that he and his brother had recourse to the German Constitutional Court. The plaintiff sued in Germany for a cease and desist order covering the territory of Germany. In *Martinez*, a British newspaper (the Sunday Mirror) published in its online edition an article on a French national's private life (his affair with a British pop star), attributing some of the statements to his father. The father and the son sued in France for damages on the basis of violation of privacy and of the right to one's own image.

The two matters' consolidation reveals that the CJEU tends to treat all violations of personality rights uniformly, albeit from a jurisdictional perspective these could have been treated somewhat differently. For instance, defamation centres around damages to reputation, albeit in some laws damages are presumed if the content is defamatory;[34] this presupposes the existence ***260** of some reputation; on the other hand, privacy rights may be infringed once the private information is revealed, there is no need to show damages or deterioration.

The CJEU's first contribution to the case-law on jurisdiction was that it adapted *Shevill* to the characteristics of the online world: it held that in case of online contents 'distribution' of the publication means 'accessibility' (where the "content placed online is or has been accessible").[35]

Accordingly, placing content online exposes the publisher to 'mosaic' jurisdiction in virtually all Member States. The Court considered that the requirement of 'distribution' is not useful in case of online content because the content is universally accessible and it is technically difficult to quantify the number of visitors ("to quantify that distribution with certainty and accuracy in relation to a particular Member State").[36] Hence, it held that the court should not trouble itself about counting up the number of visitors/readers. Interestingly, not all courts shrunk from quantifying how many downloads a content had in a given country,[37] and this suggests that this quantification is far from impossible. The absurdity of

still be faced with future cases where a manifestly inappropriate forum would be enabled – or even required – to assume jurisdiction under the Convention by reason of connecting factors which, viewed objectively, would seem in themselves inadequate for this purpose.")

[33] See *supra* n 10.

[34] See E Barendt, "What is the point of libel law?" (1999) 52 *Current Legal Problems* 111, 120-125.

[35] See para 51.

[36] Para 46.

[37] See *Dow Jones & Co Inc v Gutnick* 210 CLR 575, 626 (2002) (High Court of Australia), paras 26 & 44 ("Harm to reputation is done when a defamatory publication is comprehended by the reader, the listener, or the observer. Until then, no harm is done by it. This being so it would be wrong to treat publication as if it were a unilateral act on the part of the publisher alone. It is not. It is a bilateral act – in which the publisher makes it

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this approach is blatant when applied to fact patterns like the one established in *Jameel (Yousef) v Dow Jones & Co. Inc.*[38], where only five people accessed the on-line content, three of which belonged to the claimant's 'camp'.

The CJEU's second contribution to the case-law on jurisdiction was the introduction of the 'centre of interests' doctrine for online violations.

The CJEU took the position that online and non-online violations of personality rights are to be treated differently; nonetheless, this difference, in fact, lay in introducing an additional base of jurisdiction for online infringements: ***261** the 'centre of interests' doctrine. This concept is applicable solely to online violations and enables the injured person to bring an action, in respect of all of the damages caused, in the forum where the injured person's 'centre of interests' is.[39] It is presumed that the 'centre of interests' is in the country of habitual residence, albeit the victim may also have his 'centre of interests' in the country where he pursues his professional activity.[40] Note that under *Shevill* the plaintiff could, on the basis of Article 5(3) of the Brussels I Regulation, sue only for the damages that emerged in the country before the courts of which he litigates. Accordingly, under Article 5(3) of the Brussels I Regulation, the injured person retains his right to sue in any Member State where the publication was distributed (in case of online content: "is or had been accessible"[41]) for the damages sustained there, and, in addition, he is granted the right to claim the entire loss in one of these Member States,[42] which is the country where his 'centre of interests' is to be found.

The Court's reasoning took the following line. Online contents differ significantly from traditional media (printed press, broadcasting) because they are ubiquitous (they are instantly accessible, their availability is not restricted in terms of visitor number and territorial availability) and the publisher, even if it wanted to, cannot restrict the content's availability outside its country of establishment.[43] Due to these circumstances, the requirement of 'distribution' is not useful in case of online content, because the content is universally accessible and it is technically difficult to quantify the number of visitors.[44] So far, so good: the online world is different and calls for the rethinking of the old concepts; this could hardly be contested, albeit – as noted above – not all courts have shrunk from quantifying how many downloads a content had in a given country, suggesting that this is far from impossible.[45] Nonetheless, in the next step of the argumentation, the Court made it clear that the main concern raised by online infringements is that they may be extremely injurious to the victim; the judgment argues that all the above suggests that it is difficult to give effect "to the

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available and a third party has it available for his or her comprehension.") ("In defamation, (…) ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form (…). In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done."); *Jameel (Yousef) v Dow Jones & Co. Inc.* [2005] EWCA Civ 75; [2005] QB 946; [2005] 2 WLR 1614; [2005] EMLR 353 (Here, the court established lack of jurisdiction due to abuse of process because only five people accessed the content, three of which belonged to the claimant's 'camp'.); *Al Amoudi v Brisard* [2007] 1 WLR 113 (The court held that the fact that the content was uploaded to the internet does not trigger the presumption of having been published in the country concerned: the plaintiff has to prove that it was accessed and downloaded.)

[38] See *supra* n 37.

[39] Para 48.

[40] Para 49.

[41] Para 51.

[42] The judgment's language is clear in that a person may have only one 'centre of interests' and this may be located only in one country.

[43] Para 45.

[44] Para 46.

[45] See *supra* n 37.

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criterion relating to the occurrence of damage" and these difficulties contrast with the "serious nature of the harm" the victim of the violation suffers due to his universal and unlimited exposure to the injurious content.[46]

From the above, the CJEU drew the conclusion that the court of the 'centre of interests' is in the best position to assess the allegedly injurious content's ***262** impact on the victim's personality rights, and this jurisdictional base is in line with the objective of *"the sound administration of justice"*.[47] This chain-link of the argumentation may appear to be surprising, since – in accordance with the Court's settled practice as reiterated in the judgment – the *"particularly close connecting factor"* between the dispute and the court, which establishes the special jurisdiction, is to be grasped in terms of procedural efficiency and convenience.[48] Though there are certain provisions in the Brussels I Regulation that aim at protecting the weaker party, the victims of personality rights violations are not mentioned here.[49] Nonetheless, if one disregards the illegitimate temptation to protect the alleged victim, the only question that remains is whether the court of the injured person's 'centre of interests' is in the best position to collect the evidence and hear the witnesses. Albeit that the vast majority of the harm is expected to occur in this country, it is hardly comprehensible why this court would be in a better position than the court of general jurisdiction to adjudicate the damages occurring outside its territory. Whereas it could be argued that it is more efficient to consolidate the claims in one procedure, it was exactly this argument that was rightly refused in *Shevill*: the plaintiff may always enforce the whole claim in the Member State where the defendant is domiciled. All in all, it is difficult to see what is the connection between the court of the victim's 'centre of interests' and the damages outside this country that places this court in a better position to adjudicate on these damages.

Interestingly, the doctrine proposed by the Advocate General was the 'centre of gravity of the dispute' test, and the victim's 'centre of interests' was only one of its two pillars.[50] Due to the 'centre of gravity of the dispute' test, the court would have been required to examine also the information's inherent connection with the country of the 'centre of interests'.[51] Accordingly, the victim's 'centre of interests' would establish jurisdiction only if the information concerned was expressed "in such a way that it may reasonably be predicted that that information is objectively relevant in a particular territorial area." This requirement would be met if in the light of the circumstances the content included information "which arouses interest in a particular territory and, consequently, actively encourages readers in that territory to access it."[52] The CJEU in its judgment disapproved the element based on the nature of the information; nonetheless, it may be presumed that if information is objectively relevant in a country outside the publisher's seat, then this is the country where the victim has his 'centre of interests'. This may have been the reason why ***263** the Court disapproved the second element of the proposed test. The Advocate General's Opinion considered that the requirement of the information's objective relevance refers "to situations in which a media outlet may reasonably foresee that the information published in its electronic edition is 'newsworthy' in a specific territory".[53] On the other hand, the Court's judgment noted that the 'centre of interests' doctrine is in accordance with the purpose of predictability anyway, since

[46] Para 47.
[47] Para 48.
[48] Para 40.
[49] See Articles 8-21.
[50] Para 59.
[51] Para 60.
[52] Para 60.
[53] Para 63.

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the publisher should know the 'centre of interests' of the person concerned by the content placed online.[54]

A frequently ignored strand of the violation of personality rights is criminal law. The violation of privacy and personality rights is, in several countries, also covered by criminal law.[55] This circumstance is relevant from the point of view of civil jurisdiction as well. In most Member States, criminal courts have the power to award damages or other restitutive remedies in connection with the criminal act convicted. In such cases, criminal courts exercise civil jurisdiction. Article 5(4) of the Brussels I Regulation envisages such a situation and conjugates the jurisdiction to award damages or other restitutive remedies with criminal jurisdiction, which is a concept external to the Regulation.[56]

The CJEU, in *Dieter Krombach and André Bamberski*[57], made it clear that if a national court claims to have criminal jurisdiction, no Member States court has the power to refuse recognition and enforcement on the basis that the court of origin lacked criminal jurisdiction, albeit the question of criminal jurisdiction is out of the reach of the Brussels I Regulation and the Regulation contains no express requirement regarding criminal jurisdiction, which seems to be a matter of Member State law. In other words: it is irrelevant whether the national rule of criminal jurisdiction is completely one-sided, unilateral and unfair (exorbitant); once the Member State claims that it does have such a power, the jurisdiction over civil claims for damages or restitution automatically follows and recognition and enforcement cannot be refused on the ground of lack of jurisdiction. It cannot be argued that the Member State, having the subjective perception of being competent, has no criminal jurisdiction in the international sense. Though in *Dieter Krombach and André Bamberski* the question of criminal jurisdiction emerged in the context of recognition and enforcement, it can be easily argued that Article 5(4) opens the system of the Brussels I Regulation, ***264** though in a limited scope, to an extraneous world and criminal jurisdiction is completely up-to the Member States.[58]

A state may claim criminal jurisdiction because the act was committed on its territory (principle of territoriality) or simply due to the fact that the perpetrator or the victim was its national (principle of nationality and principle of protection). These provisions may bring back exorbitant rules of jurisdiction through the backdoor.[59]

2. Conclusions on jurisdiction: the assessment of the case-law

(a) Should online and non-online matters be treated alike?

[54] Para 50.
[55] Bulgaria, the Czech Republic, Denmark, , Estonia, Finland, France, Germany, Greece, Ireland, Italy, Hungary, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Spain and the United Kingdom. *Comparative study*, *supra* n 1, pp. 42-44.
[56] Article 5(4) of the Brussels I Regulation provides that "a person domiciled in a Member State may, in another Member State, be sued: (…) as regards a civil claim for damages or restitution which is based on an act giving rise to criminal proceedings, in the court seised of those proceedings, to the extent that that court has jurisdiction under its own law to entertain civil proceedings."
[57] Case C-7/98 [2000] ECR I-1935.
[58] Another crucial point of interpretation is that Article 5(4) applies only if the criminal and the civil claims are settled in the same procedure, i.e. the criminal court deals with the civil claims. On the other hand, Article 5(4) cannot be used to bring a case to the civil courts of the Member State the criminal courts of which are entertaining the criminal procedure: if the civil claims do not adhere to the criminal procedure, the requirements of Article 5(4) are not met.
[59] See Case No. 0718523043 *Public Prosecutor v Weiler* (Judgment of March 3, 2011) (Tribunal de Grand Instance de Paris) (Here, the French criminal court declined jurisdiction.)

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In *eDate/Martinez*, the CJEU considered that online content is to be distinguished from non-online content and they are to be treated differently on the level of principles; an approach that may easily qualify as odd from a comparative perspective.[60] Both the CJEU's judgment and the Advocate General's Opinion refer to a set of circumstances that warrant this diverging treatment. Unfortunately, whereas both of them describe these differences profoundly (in fact, the Opinion draws a comprehensive inventory), they seem to fail to draw the conclusions that follow from these differences.

As noted above, in the CJEU's judgment the reason for this bifurcation was the ubiquity of the online content.[61] The Advocate General's Opinion explains in detail why the online world is particular. Traditional media (printed media, television and radio) operates in a "markedly national context"[62], while the World Wide Web "put an end to that tendency towards territorial fragmentation of the media."[63] Immediacy and permanency pertain to the online world, which enables "permanent, universal access, which individuals may distribute immediately to one another."[64] The online world is characterized by a "signifi***265**cant lack of political power (…) leading to (…) [its] material deregulation".[65] These features have significant repercussions both on publishers and potential victims. As the Advocate General's Opinion concludes, the foregoing features of the online world deprive publishers from legal certainty, as they have to comply with plentiful, potentially conflicting legal regimes and this may have a chilling effect, discouraging the exercise of the freedom of information. It is difficult, or sometimes even impossible, for the publisher to control the distribution and the availability of the content.[66] As far as victims are concerned, they are in a particularly vulnerable position towards online violations: on the one hand, the harm suffered is potentially more acute due to the internet's infinity both in terms of time and territory; on the other hand, it is more complicated for them to enforce their rights, since the harm is subjected to different laws and different jurisdictions.[67] Accordingly, the victims' potential harms highly increase, while their legal protection weakens considerably.

The above enumeration of the differences seems to be very detailed, albeit, at some points, it seems to exaggerate the differences between the online and non-online segments of the media. Some online media contents are still fragmented along national borders due to cultural and, most of all, language differences; on the other hand, there are plenty of traditional 'publishers' that have a clearly transnational role: there are international television stations and newspapers. Furthermore, the difficulties faced by potential victims are normally not entailed by dispersed jurisdiction (especially, because they may always sue in the country where the publisher is domiciled) but by the technical difficulties of law enforcement. These difficulties are less significant in the European judicial area, where the free movement of judgments is ensured, and are more prevalent in cases involving non-EU publishers.

Although the Advocate General's Opinion refers to the chilling effect the publisher's exposure to lawsuits abroad may have on the exercise of the freedom of information,[68] its conclusions seem to fail to address this facet. The CJEU in *eDate/Martinez* completed the

[60] See L Edwards, "Case Comment: The Scotsman, the Greek, the Mauritian company and the Internet: where on earth do things happen in cyberspace?" (2004) 8 *Edinburgh Law Review* 99, 100 ("Despite the ubiquity of the problem, no jurisdiction has yet, to this writer's knowledge, expressly developed rules of jurisdiction tailored ab initio for the internet. Instead valiant attempts have been made to adapt existing case-law, constitutional principles, legislation and international treaty law to meet the challenge of the internet.")
[61] Para 45.
[62] Para 40.
[63] Para 43.
[64] Para 44.
[65] Para 45.
[66] Para 47.
[67] Para 48.
[68] Para 46.

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case-law as to online matters in two questions: first, it re-interpreted the requirement of 'distribution' and it equated this with 'accessibility'; second, it introduced the doctrine of 'centre of interests'. None of these are in line with the purpose of tackling the chilling effect. Of course, the rights of the victims may be regarded as prevalent as compared to the expectations of the publishers Nonetheless, whereas both the judgment and the Opinion rightly point out that the online world may make both publishers and potential victims more vulnerable, none of them reveals why only the victims' side was taken into account when interpreting Article 5(3) of the ***266** Brussels I Regulation; it seems that the expectations of the publishers, initially identified as relevant, were ignored at the end of the day.

The bifurcation of the jurisdictional rules seems to excessively over-complicate the adjudication of matters emerging from the violation of personality rights: numerous publishers display the same content both in their online and non-online publications. Albeit in *Martinez* the rebuked content appeared only in the internet edition of the Sunday Mirror, online and printed editions are normally in line with each other. Hence, the bifurcation of the jurisdictional rules may lead to plenty of uncertainties. The court where the 'centre of interests' lies may have jurisdiction to enjoin the publisher from displaying the content online and this prohibition may cover all Member States, nonetheless, the publisher would remain free to publish the content in print outside the Member State of the court that rendered the judgment. It is easy to imagine the spill-over effects such printed publications may have on the contents appearing online. The same holds true if the content is broadcasted by a television station and placed online on its website. For instance, if defamatory content about a German pop-star is broadcasted by the BBC and, at the same time, appears on the BBC's website, a German court would have jurisdiction to interdict the BBC from placing the content online and from broadcasting the information in Germany; on the other hand, broadcasting outside Germany would remain intact. The situation is even more complicated if the plaintiff sues also for damages and does not content himself with an injunction. How could the German court distinguish the harm caused by the online publication from the harm entailed by the broadcast. This is very probably an impossible task: some may have heard the allegedly defamatory content from the BBC's news, some others may have read (or even heard) it online, while a lot of people may have heard it from the BBC's news and then opened the BBC's website for details.

The CJEU's judgment seems to take the position that the problems raised by the internet are completely new and have not been known in the traditional media at all. On the other hand, the truth seems to be that international publications did raise most of these questions before the emergence of the World Wide Web, albeit the intensity of these problems was much smaller. Transnational publications and fragmentation of jurisdiction are not new under the sun; leading European newspapers are usually distributed in all Member States, albeit access to them is certainly more restricted than to their websites. Indeed, the pace of the flow of information and the unlimited availability in terms of time and territory catalyse these processes. Nonetheless, it is highly questionable whether the problems raised by the internet are new qualitatively or just quantitatively.

It seems that some facets connect, some disconnect the traditional and the online media; and very probably there are more facets that connect ***267** them.[69] Taking into account that

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[69] See O Bigos, "Jurisdiction over cross-border wrongs on the internet", (2005) 54 *International & Comparative Law Quarterly* 585, 602 & 603 (Endorsing the view "that traditional rules can be applied to cases which arise in the online environment and that the internet is merely a natural extension of existing forms of communication technology, rather than a novel form requiring sui generis laws.") ("Courts have grappled with every new form of technology by adapting the existing rules. The internet is no different. It is simply on a larger global scale."); Y Farah, "Jurisdictional aspects of electronic torts, in the footsteps of Shevill v Presse Alliance SA", (2005) 11 *Computer and Telecommunications Law Review* 196, 200 ("The rules applied in different jurisdictions when deciding whether or not a court has jurisdiction in an electronic tort context converge on the main premise that

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the internet raises old theoretical questions with higher intensity (in fact, with a surpassingly higher intensity) and that often the same content appears both online and non-online, there seems to be little point in subjecting these two worlds to jurisdictional rules that differ fundamentally on the level of principles. Naturally, the same principles may have different application in the traditional media and in the context of the internet. Equating distribution with online accessibility may amount to such an adaptation (though, as argued below, to a very imperfect one). Nevertheless, the introduction of a particular base of jurisdiction in the form of the 'centre of interests' doctrine seems to be flawed.

(b) Is derogation from the the actor sequitur forum rei *principle restricted to cases where there is a sufficiently close connection between the forum and the dispute?*

The measure of value of the case-law under Article 5(3) of the Brussels I Regulation is how it fits the system of the Regulation. The starting point of the Regulation's jurisdictional rules is that the plaintiff has to go to the defendant's forum (*actor sequitur forum rei*). Derogations from this fundamental rule are justified by the intrinsic connection between the forum and the dispute in terms of procedural efficiency; these derogations are to be construed narrowly.

In the following, the observance of the above principle is examined in three steps. First, is the mosaic theory as established in *Shevill* in accordance with the above approach? Second, does the reconstruction of the mosaic theory to apply to online matters square with the above principles? Third, does the 'centre of interests' doctrine developed for online violations of personality rights fit in with the above approach?

The mosaic theory of *Shevill* is extensively analysed in the scholarship and criticised due to its enabling 'distributive' law enforcement, i.e. the plaintiff ***268** can chop up the claim for damages and litigate the different parcels in different Member States.[70]

First, this jurisprudence is criticised because of the fact that if the defendant is compelled to face a lawsuit before an inconvenient forum this encourages it to settle even if the claim were less substantiated (vexatious trials).[71] Second, it is also criticised that, although under Article 5(3) of the Brussels I Regulation the jurisdiction of the court is limited to the loss that occurred in the Member State concerned (i.e. the court's jurisdiction is based on the circumstance that *damnum* emerged here), winning the law-suit in one country (notwithstanding that this is not the most closely connected country to the matter) gives the plaintiff a symbolic victory over the defendant, entailing extra-territorial implications, though not from a legal perspective.[72]

Although the value judgment of the Brussels I Regulation is clear (due to the *actor sequitur forum rei* principle, it is the plaintiff who has to bear the inconveniences of the litigation), in this case there is a special circumstance that establishes a link between the forum and the matter: the place of the occurrence of the damage. Even though it could be

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the traditional rules must be equally extended to electronic torts."); J-J Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights" (2011) 12(8) *German Law Journal* 1681, 1684 (Arguing that the difference between the online and non-online world should not be overestimated; and "[t]he mere fact that the defamatory information was published online, instead of in print, should not lead to a different outcome in private international law.")

[70] See e.g. TC Hartley, "Case Comment: Article 5(3) of the Brussels Convention", (1992) 17 *European Law Review* 274, 275; A Warshaw, "Uncertainty from abroad: Rome II and the choice of law for defamation claims" (2006) 32(1) *Brooklyn Journal of International Law* 269, 282.

[71] A Warshaw, "Uncertainty from abroad: Rome II and the choice of law for defamation claims" (2006) 32(1) *Brooklyn Journal of International Law* 269, 282.

[72] A Warshaw, "Uncertainty from abroad: Rome II and the choice of law for defamation claims" (2006) 32(1) *Brooklyn Journal of International Law* 269, 282.

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argued that the rules of special jurisdiction, including the one on torts, are senseless and they turn the general principle of *actor sequitur forum rei* upside down, these rules are currently part of the architecture of the Brussels I Regulation. In other words, even though it could be argued that the rules (and the judicial practice) on special jurisdiction should be revised and amended, it seems to be misplaced to argue that, within the existing scheme, matters concerning privacy and personality rights should be treated differently from other matters in general. The question is how the link between the matter and the forum can be established and how to distinguish strong from weak links.

Unfortunately, the language of *Shevill* widens the ambit of Article 5(3) excessively. It is a maxim of interpretation that the purview of the special rules of jurisdiction is to be kept as narrow as possible: since these provisions represent an exception to the general rule, their application is to be restricted to those cases where the relationship between the forum and the matter warrants such a derogation.[73] This implies, first, that contrary to *Shevill* 'some' publication should not suffice; the question of inquiry should be whether there is a sub***269**stantial link between the forum and the harm (and not between the forum and the publication as such).

Normally, such a substantial link is present if the alleged victim has a reputation in the country in question or the publication's circulation is significant. Furthermore, it is also implied that if there is harm in the country concerned, and thus the strong linkage is present (in terms of procedural expediency), the subject-matter competence of the courts having special jurisdiction should be kept as restricted as possible, i.e. as established in *Shevill*, the jurisdiction is to be confined to the damage that occurred there.

The volatile and imperfect balance of *Shevill* seems to have been spoiled by the CJEU's adaptation of the mosaic theory to the online world in *eDate/Martinez*. *Shevill* required 'some' publication (distribution) to establish jurisdiction; and, as noted above, the concern with this approach was not that it is too stringent but that it is too soft. Under these circumstances, one may have expected the CJEU to constrict this loophole instead of widening it. Nonetheless, in *eDate/Martinez*, the CJEU, instead of building higher dams, dismantled them completely: it held that an online content is to be regarded as having been 'distributed' in a country if it is or has been accessible there. This interpretation seems to be odd. The 'distribution' requirement is the surrogate of requiring the publication to have been read in a given country; as it would be very complicated to ascertain the number of persons who read the publication, the publication's circulation is to be examined; and distribution is a very reasonable proxy: if someone purchases a publication, it is highly probable that he actually reads it. Nonetheless, in the online world, accessibility is not a reasonable surrogate of requiring the publication to have been read.[74] The consequence of the requirement of

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[73] See P M North & J J Fawcett, *Chesire and North's Private International Law* (11th ed., London, Butterworths 1987), 296.; Recital 11-12 of the Brussels I Regulation; Case C-26/91 *Jakob Handte & Co. GmbH v Traitements Mécano-chimiques des Surfaces SA* [1992] ECR I-3967, paras 18-19.; CsI Nagy, *Az Európai Unió nemzetközi magánjoga* [in English: The Private International Law of the European Union] (Budapest, HVG-Orac, 2006) 60.

[74] Cf. O Bigos, "Jurisdiction over cross-border wrongs on the internet", (2005) 54 *International & Comparative Law Quarterly* 585, 610 & 614 ("[A]s a general principle, the first point in time at which damage can be suffered from a wrong on the internet is when the material is accessed and downloaded from a website or an email is received. Importantly, damage is not suffered when the material is uploaded on a website or stored on a server (either as a website or as an email). No human can be said to be suffering damage at that stage.") ("The focus is on damage to reputation. Reputation is harmed only when a defamatory publication is comprehended by the reader, listener, or observer. Thus publication is not a unilateral act on the part of the publisher alone, but rather a bilateral act in which the publisher makes it available and a third party comprehends it."); G Smith, "Here, there or everywhere? Cross-border liability on the internet" (2007) *Computer and Telecommunications Law Review* 41, 43 (Arguing that basing jurisdiction under Article 5(3) of the Brussels I Regulation on mere availability "would be contrary to the scheme of the Regulation, in which Art.5(3) is intended to be a limited exception from the basic rule that a defendant is to be sued in the courts of his domicile."); N Joubert, "Cyber-torts and personal

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accessibility is that, since content placed on the internet is normally accessible everywhere on the globe, all online publications are, automatically and unqualifiedly, subject to jurisdiction in all Member States, irrespective of whether they were read there or not. The only consolation for ***270*** the defendant is that this jurisdiction is confined to the damage that occurred in the territorially competent country.

Probably, the CJEU had in mind that if a content is accessible online, it is very probably also read by some; nevertheless, this is not necessarily the case; exactly the opposite happened in *Jameel (Yousef) v Dow Jones & Co. Inc.*[75], where only five people accessed the content, three of which belonged to the claimant's 'camp'. It is to be noted that although the world wide web is technically indeed world-wide, it is not free from language and cultural differences and barriers, similarly to the non-online world. It is hardly certain (contrary to the ECJ's assumption) that an Estonian language content posted on an Estonian website is necessarily accessed in Austria. Taking all these things into account, it is doubtful that it was wise for the Court to remove the requirement of distribution? Both the CJEU's judgment and the Advocate General's Opinion pay lip service to the relevance of foreseeability on the side of the publisher; nonetheless, the 'accessibility' requirement, in fact, entails that the publisher may be sued in any Member State, even if on a 'distributive' basis. One may hardly imagine a rule more adverse to the requirement of foreseeability; or perhaps this is foreseeability in a perverse sense.

In *eDate/Martinez*, the CJEU topped up the foregoing with the 'centre of interests' doctrine, which turns the *actor sequitur forum rei* upside down, into *reus sequitur forum actoris*. Though the language of the judgment does not expressly require that the content effectively appear in this country, it may be assumed that it is a requisite that the content is or has been accessible in the country where the 'centre of interests' is; nonetheless, nothing more than mere accessibility is required.

It is highly questionable whether this court's extraterritorial jurisdiction is justified, i.e. what does the close connection between the extraterritorial damage and the forum consist of? Assume that an Italian website displays defamatory information about a well-known and prestigious Greek businessman engaged in the sea-carriage industry; his 'centre of interests' is in Greece, this is where he has his habitual residence, where he was born, where his family lives etc.; but he has a strong reputation and intensive business relations in Italy as well. Would Greek courts indeed be in the best position to assess what reputation the Greek businessman had in Italy, what the echoes of the information in the Italian press were, how it was received, whether and how the injured person's reputation changed there. The accomplishing of this assessment may require, at least, the interrogation of Italian witnesses and the reading of Italian (online and non-online) sources. None of them support the position that Greek courts would be in a particularly good position to adjudicate the damage in Italy.

271 As a matter of practice, the 'centre of interests' rule entails a substantial change primarily in respect of a person having a reputation in more than one country. Victims having reputation mainly in one country (their country of habitual residence) could, under *Shevill*'s mosaic theory, enforce the vast majority of their claims in their home country. Albeit the jurisdiction of this court was territorially restricted, this was the territory where the bulk of the damages emerged. On the other hand, persons having a reputation in more than one country may have found the mosaic theory particularly disadvantageous, since the loss they allegedly suffered may have been geographically dispersed. Under *Shevill*, they were required to sue in several Member States to collect compensation for the entire loss. In this sense, the 'centre of

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jurisdiction: the Paris Court of Appeal makes a stand", (2009) 58 *International & Comparative Law Quarterly* 476, 477-478 (Submitting that mere accessibility should not constitute a basis of jurisdiction.)

[75] See *supra* n 37.

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interests' doctrine favours celebrities and persons having an international reputation, who often do have the resources to sue outside their country of domicile.

It is especially surprising that extraterritorial jurisdiction is permitted specifically in online matters. Judicial injunctions concerning online content do, almost necessarily, have extraterritorial repercussions, even if, legally speaking, the purview of the court's judgment is territorially limited. The *Yahoo* case[76] is a perfect example of this: it is hardly feasible for a website to effectively limit the accessibility of its content to certain countries.[77] Hence, a national injunction may easily result in the content's global removal.

What may justify the extraterritorial jurisdiction of the 'centre of interests' court, if there is, in terms of procedural efficiency, no close connection between these 'mosaics' and the forum? First, it could be argued that this is the protection of the victim who is the weaker party and exposed to the consequences of the violation globally, contrary to the victim of the printed press, where the publication has, normally, only regional relevance. Although the protection of the victim *could be* a valid justification, it *is not*. Special jurisdiction is based on the close connection between the dispute and the forum; this is the fundamental issue to be analysed here. Some corrective considerations may indeed be taken into account, but the 'centre of interests' doctrine establishes jurisdiction over mosaics the forum has no close connection with. Furthermore, the Brussels I Regulation does contain certain jurisdictional rules that are meant to protect the weaker party (consumers, employees, insured persons, policy holders); the victims of the violations of personality rights are not enumerated there. Second, it could also be argued that the partitioning of the claim under the mosaic theory does not serve the purpose of procedural efficiency, so 'smaller' claims should amalgamate with the 'main' claim. The CJEU in *Shevill* refused this argument very effectively: special jurisdiction ranges ***272** to the point the close connection between the dispute and the forum subsists; if the plaintiff does not like the jig-saw puzzle, he may always sue in the country of the defendant's domicile.

(c) The anomalies related to the application of the mosaic theory: the Judgment of Solomon or how to split a child?

The jurisprudence and the scholarship are at fault for the answer to a very important question of the mosaic theory: although the CJEU made clear that if the plaintiff sues in the Member State where the damage was sustained, the court's jurisdiction is confined to the loss that occurred in that country, not all remedies can be cut in parts (in terms of territory) and be constrained in the bed of Procrustes of national borders. The *quantum* of damages may be limited to the negative consequences that happened in the Member State concerned. Nevertheless, one of the pre-requisites of awarding damages is that the conduct giving rise to the negative consequences is designated as illegal or illicit. If the court in one Member State awards damages, even if the amount is trivial, it implicitly establishes that the conduct was unlawful; does this ruling on illegality impact or even bind the decision of another court dealing with the negative consequences of the same conduct in another country? The CJEU in *Shevill* provided that the national court's jurisdiction, on the basis of Article 5(3) of the Brussels I Regulation, is limited to awarding compensation for the damages sustained in that country; *eDate/Martinez* expressly extended this to the online world. Nevertheless, these rulings failed to specify whether the court's decision on illegality should also be confined within national borders.

[76] On the anomalies of the *Yahoo* case see B Maier, "How has the law attempted to tackle the borderless nature of the internet?" (2010) 18 *International Journal of Law & Information Technology* 142-175.
[77] See *infra* n 95-96. See also O Bigos, "Jurisdiction over cross-border wrongs on the internet" (2005) 54 *International & Comparative Law Quarterly* 585, 618.

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If the question is answered in the negative, then the Article 5(3) court would exercise *quasi* general jurisdiction in respect of the issue of illegality; a situation going counter to the fundamental jurisdictional principle of the Brussels I Regulation. If the question is answered in the affirmative, there is a very high risk of irreconcilable judgments; again, a circumstance going counter to one of the core aims and principles of the Regulation.

Assume that a French newspaper published in France and distributed in France (98 000 copies), England (1,000 copies) and Belgium (1,000 copies) contains an allegedly defamatory article about a Dutchman, who in turn institutes a libel suit in Belgium, where the court establishes that the French newspaper violated the injured person's personality rights and awards him some compensation in respect of the negative consequences perceivable in Belgium. Afterwards, the Dutchman sues the French publisher in France for damages and argues that since the Belgian judgment is to be recognised in France automatically (on the basis of Article 33 of the Brussels I Regulation), the French court cannot review whether the article published was indeed defamatory and its competence is restricted to the *quantum* of damages. Here, the perversity of the claim lies in the circumstance that a court with a modest connection with ***273** the fact pattern (only 1 % of the newspaper's circulation is realized here) would render a final and '*erga omnes*' judgment concerning the question of illegality if the proceeding is launched first in this country. It is to be taken into account that, in European libel cases, the amount of damages awarded is normally not extreme and – from a practical point of view – the plaintiff might primarily be interested in establishing the illegality of the defendant's act.

The purpose that the tail should not wag the dog strongly suggests that 'mosaic' adjudication should imply the 'distributive' establishing of illegality. The requirement of close connection is not limited to the existence and *quantum* of damages but it also covers the question of illegality, with all the imperfections this may cause.[78]

An adjunct question is how the rules on *lis pendens* and related actions are to be applied if parallel proceedings are pending in the above scenario. According to Article 27 (*lis pendens*), any court other than the court first seised shall *ex officio* stay its proceedings if the proceedings involve "the same cause of action and between the same parties are brought in the courts of different Member States". If the court first seised establishes its jurisdiction, "any court other than the court first seised shall decline jurisdiction in favour of that court." In case of related actions the second seised court may (but it is not obliged to) stay its proceedings (Article 28).

Assume that in the above matter the victim sues in Belgium, and subsequently the publisher sues in the Netherlands for the declaration of non-violation. These two actions involve partially the same cause of action: while the Dutch action deals with the alleged defamation in general, including the loss sustained in Belgium, the action pending in Belgium is confined to the loss occurred within the national borders of this country. This may imply that the Dutch court has to stay its proceedings and await the Belgian court's decision on jurisdiction. If the latter establishes its jurisdiction, it is questionable how the Dutch court should proceed on the basis of Article 27. Similar uncertainties emerge if the publisher tries to avoid the *lis pendens* problem and limits its claims in the Dutch procedure to the loss allegedly sustained outside Belgium, i.e. the plaintiff requests the court to declare that the conduct was not illegal and no damages emerged outside Belgium. Under such circumstances the Dutch court may (or should) stay its proceeding under Article 28, since the actions in

[78] Contra O Bigos, "Jurisdiction over cross-border wrongs on the internet", (2005) 54 *International & Comparative Law Quarterly* 585, 617-618 & 619 (Arguing that although seemingly there would be an inconsistency in authorizing a court to grant universal injunction, while limiting its jurisdiction to damages sustained within the national borders of the court's state, "[t]his inconsistency is more apparent than real." Concluding that "[t]he Shevill limitation should not be applied to injunctions.")

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Belgium and the Netherlands are related: "[w]here related actions are pending in the courts of different Member States, any court other than the court first seised may stay its proceedings."

274 And what happens if in the above scenarios the plaintiff is the publisher, which pursues a declaratory judgment outside the Netherlands (the defendant's place of domicile) simply because it smells that the victim may want to sue for damages (e.g. the publisher has received two warning letters from the victim, claiming compensation and threatening the publisher with a lawsuit). It is not easy to imagine a more vexatious and abusive trial.

(d) The violation of personality rights and criminal liability

An interesting, and mainly neglected, aspect of libel suits is their interaction with criminal liability. Criminal law is an *ultima ratio* regulatory tool, especially in libel matters: here, there is also a fundamental right requirement to keep criminal liability as limited as possible. Nonetheless, in several countries criminal law may be used as a tool to prevent defamatory acts or to lift some of their consequences; furthermore, in most countries, the victim may enforce his civil rights and restitutionary claims in the framework of a criminal procedure. Hence, it cannot be disregarded that criminal jurisdiction is a question extraneous to the Brussels I Regulation and its judicial interpretation, while it entails civil jurisdiction.

(e) Indirect communication or the problem of 'hearsay'

The judicial practice of the Brussels I Regulation does not settle the problem of 'hearsay', i.e. the case where the allegedly defamatory content published in one country is 'retransmitted' in another country (e.g. an English newspaper includes a piece of news initially published in France; a Hungarian website reports about a piece of news broadcasted by a Polish television station). The CJEU made it clear that jurisdiction is not vested in all countries where the detrimental consequences are sustained. In *Antonio Marinari v Lloyds Bank plc and Zubaidi Trading Company* this proposition was confirmed in the context of defamation. Accordingly, indirect or negligible consequences are not capable of grounding jurisdiction. Nevertheless, in *Marinari* the plaintiff simply claimed that his reputation was damaged in general, without identifying any specific detrimental consequence (e.g. break of business relations).

The problem of 'hearsay' pertains especially to online violations. It is one of the special features of the internet that the users are, even unconsciously, partaking in the dissemination of the information and information spreads more quickly than in the non-online world. The Advocate General's Opinion neatly describes this process: "[w]hen information content is uploaded to the Net, individuals immediately become – voluntarily or involuntarily – distributors of the information, by means of social networks, electronic communications, links, blogs or any other methods which the internet provides."[79] Assume that ***275*** a Hungarian website places online privacy-violating pictures about a German politician and links to the Hungarian website appear on German websites. German users would probably not access the pictures if they did not appear on German websites. The German websites may even borrow contents from the Hungarian website and store the pictures on their servers, so German users do not need to visit the Hungarian website to get access to the pictures.

The CJEU's judgment in *eDate/Martinez* lifted the above problems: since the Hungarian website, due to its accessibility here, may be sued in Germany anyway, it is irrelevant whether German users accessed the Hungarian website or the content copied by some German websites.

[79] Para 47.

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3. Proposals

The Brussels I Regulation sees special jurisdiction essentially as follows. The plaintiff has to follow the forum of the defendant (*actor sequitur forum rei*), however, special rules of jurisdiction apply if there is a strong connection between the matter and another forum. This implies, first, that the special rules of jurisdiction are not about the sovereignty (rights) of courts but about the expediency of the procedure: the court where the harmful event occurred is assumed to be better placed to hear and adjudicate the case. Second, the special rules are exceptions to a fundamental principle, which represents the core value of the Regulation. This implies, on the one hand, that the exceptions are to be construed narrowly; and, on the other, that special jurisdiction cannot go beyond what justifies its existence (requirement of strong connection). Furthermore, the principle of foreseeability also requires that the defendant should be in the position to estimate where it could be sued due to its acts or omissions. The mission of the Brussels I Regulation suggests that special rules of jurisdiction must not turn the architecture of the Regulation upside down, and these rules shall not enable the plaintiff to abuse its possibilities thus bringing back exorbitant bases of jurisdiction through the backdoor; this point leads us back to the requirement of strong connection.[80]

The above principles of the Brussels I Regulation should be uniformly and equally applicable both to online and to non-online contents. It seems to be flawed to apply different principles to these two segments of the media and social communication. Instead, the same principles should be applied and, when necessary, adapted.

On the basis of these principles, the following is submitted. First, the 'centre of interests' doctrine of *eDate/Martinez* should be abandoned. Second, the mosaic theory introduced in *Shevill* should be filtered and something more than 'some' distribution should be required to establish jurisdiction. Third, in case of online content, more than mere accessibility should be required to establish ***276** jurisdiction; here, the actual access (number of visitors, downloads etc.) should be the surrogate of distribution.

Normally, in libel suits the troubles emerge from the phenomenon that publications have both 'main directions' (which may cover numerous countries) and 'side-effects'. In *Shevill*, for instance, the main direction of *France-Soir* was France, where 237,000 copies were sold, while it had side-effects in several countries, where, however, only 15,500 copies were distributed altogether (in England and Wales this was 230). The relationship between the publication and the courts of the country of main direction seems to be obviously strong. The question is whether there are such strong links in side-effect countries.

If the parties are domiciled in the same country, the above principles suggest that suing in another Member State is justified at best only if substantial harm occurred there. Changing the fact pattern, assume that in *Shevill* the alleged victim of *France-Soir* was a Frenchman. In this case it would be very strange if the plaintiff sued in England, provided he is not widely known there; note that 230 copies of the newspaper were sold in England and Wales, contrary to the 237,000 copies sold in France. Or assume that in *eDate* both parties are Austrians but the plaintiff sues in Italy, where the website it not read or the number of visitors is negligible.

If the parties are domiciled in different countries and the plaintiff sues in the country of main direction, the strong linkage between the matter and the forum is undoubted.[81] Note that a publication's main direction may cover different countries. It is a tough proposition how to

[80] Cf. *Jameel (Yousef) v Dow Jones & Co. Inc.*, see *supra* n 37.

[81] Cf. T C Hartley, "'Libel tourism' and conflict of laws" (2010) 59 *International and Comparative Law Quarterly* 25, 31 (Suggesting that the application of Article 5(3) of the Brussels I Regulation should be confined, among others, to cases where *„the defendant has taken significant steps to make the offending material available in the country of the forum and has targeted that country more than any other."*)

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approach matters where the plaintiff allegedly suffers harm both in the country of main direction and in a side-effect country. Here, the above principles suggest that the courts of the side-effect country should have jurisdiction only if the harm sustained here is substantial, meaning that either the circulation of the publication is substantial or the reputation of the alleged victim is significant. The domicile or habitual residence of the victim in that country may be relevant indices (but not determinative ones), as it may be assumed that the person has a strong reputation in his home country. Where would someone have (either good or bad) a reputation if not in his country of domicile?

The situation is somewhat simpler if the victim is not known in the country of main direction but has a reputation in a side-effect country. In such a case it may automatically be assumed that damages occurred in the side-effect country: if detrimental effects emerged, they emerged, in all likelihood, here. Probably, this might have been the case in *Shevill*: although the newspaper had a very modest circulation in England, Ms Shevill was domiciled there.

277 If Ms Shevill had been a German citizen (and domiciliary), she should have failed on the point of jurisdiction: it is improbable that there is a strong connection between the forum and the matter, when a German sues a French newspaper in England where 230 out of 252 500 copies were sold. Currently, *Shevill* and *eDate/Martinez* suggest that the plaintiff can sue in any country where the publication was distributed or the online content was accessible, i.e. the German plaintiff could sue in England. Of course, it is a different situation if the German plaintiff has a strong reputation in England or the circulation of the newspaper is substantial or the online content is accessed by numerous visitors.

Nonetheless, the above argumentation does not really solve the problem of international publishers and celebrities, where the main direction is global, and likewise, there is global reputation. It is submitted that the above principles should be equally applicable to such cases; however, here it is even more suspicious if the parties are domiciled in the same country and the plaintiff sues in another one, e.g. an internationally-recognized English pop-star sues the BBC in Germany because of an allegedly defamatory content. According to *Shevill* and *eDate/Martinez*, this can be done, although the abusive nature of this action seems to be blatant.

To summarise, the proposals are the following.

First, online and non-online (printed media, broadcasting) communication delicts (defamation, privacy matters etc.) are, on the level of principle, to be treated alike.

Second, the mosaic theory of *Shevill* should be maintained but instead of diluting it, it should be confined to filter out cases where there is no close connection between the dispute and the forum. As a general principle, it is submitted that the examination should not be restricted to the bare fact of publication (or accessibility in case of the internet) but it should also extend to the question of reputation (is the victim known here?) provided that the level of circulation is, in absolute terms, low here. In the case of online content actual access (number of visitors, downloads etc.) should be the surrogate of circulation. A high level of circulation may indicate that the country comes under the publication's main direction and may 'create' reputation. It should be implied that a person has reputation in his home country (country of domicile).[82] Unfortunately, the jurisprudence of the CJEU requires solely that 'some' publication occurs in the country where the action was instituted, while in the case of online matters mere accessibility suffices.[83]

[82] *Cf.* T C Hartley, "'Libel tourism' and conflict of laws" (2010) 59 *International and Comparative Law Quarterly* 25, 31 (Suggesting that the application of Article 5(3) of the Brussels I Regulation should be confined, among others, to cases where "the claimant is domiciled in the territory of the forum".)

[83] Cf. *Crookes v Holloway* 2008 BCCA 165; (2008) 77 BCLR (4th) 201; *Al Amoudi v Brisard* [2007] 1 WLR 113 (The fact that the content was uploaded to the internet does not trigger the presumption of having been published in the country concerned: the plaintiff has to prove that it was accessed and downloaded.)

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***278** This proposition naturally does not concern issues of substantive law and, hence, it is irrelevant whether on the basis of the applicable law the proof of defamation triggers the assumption of damages. The position advocated here deals solely with the question of jurisdiction and it simply contends that in the absence of harm there is no justification for overturning the *actor sequitur forum rei* principle.

Of course, the plaintiff may still argue that he suffered specific harm (e.g. loss of clients) in a side-effect country where the circulation of the publication was small and he was hardly known (a general reference to the injury of the reputation would not substantiate such a claim). This is, however, another story.

Third, if the victim has a strong reputation in the country of main direction, the side-effect loss should be substantial to establish jurisdiction (allegation of some harm does not suffice). This condition is met if the victim's reputation is strong in this country, it being implied that the victim has such a reputation in his country of domicile. The rationale behind the third proposition is to prevent abuse. Note that the existence of the special rules of jurisdiction are justified by procedural expedience; in principle, no one has a normative right to sue the defendant outside his place of domicile. If there is no substantial reputation in this country, it is not easy to see how the connection between the matter and this forum (from a procedural expediency perspective) could be so strong as to justify turning the Brussels I Regulation's most fundamental principle upside-down. Again, the injury in the side-effect county is substantial if the plaintiff names specific consequential damages resulting from the allegedly defamatory content; but this is, again, another story.

The fourth proposal is that if the parties are domiciled in the same country, the purpose of preventing the abuse of the jurisdictional rules warrants that other Member States should have jurisdiction only if substantial harm occurred there.

C. CHOICE OF LAW PROBLEMS IN MATTERS RELATING TO BREACHES OF PRIVACY AND PERSONALITY RIGHTS

1.The legislative history of the exclusion of violations of privacy and rights related to personality from the scope of the Rome II Regulation

The scope of the Rome II Regulation does not cover "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation."[84] That is, this issue's conflict regulation comes under the purview of Member State law. The reason for this exclusion was that during ***279*** the legislative process an essential disaccord emerged between the Council and the European Parliament, and the Commission worried that this point of controversy would considerably delay the adoption of the entire regime on non-contractual obligations. Hence, it decided to omit the rules on privacy and personality rights, and revised its initial proposal.[85] Unfortunately, although the controversy related to libel matters concerning the media, Article 1(2)(g) of the Rome II Regulation excludes all matters related to 'privacy and personality rights'. Whereas the Commission's intention (as expressed

[84] Rome II Regulation, Article 1(2)(g)

[85] See A Dickinson, *The Rome II Regulation: the law applicable to non-contractual obligations* (Oxford, OUP 2008) 234-238; G Wagner, "Article: Article 6 of the commission proposal: violation of privacy – defamation by mass media" (2005) 13 *European Review of Private Law* 21; MMM Van Eechoud, "The Position of Broadcasters and Other Media under the Proposed EC 'Rome II' Regulation on the Law Applicable to Non-Contractual Obligations" (*IRIS plus, No. 2006-10*, 2006), 2 & 14-15. Available at SSRN: http://ssrn.com/abstract=973774.

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in its Amended Proposal[86]) related only to the exclusion of "press offences and the like",[87] the language of Article 1(2)(g) is rather categorical when excluding "non-contractual obligations arising out of violations of privacy and rights relating to personality, including defamation" from the Rome II Regulation's scope. Namely, the concept of personality rights, in different legal systems, may (as noted in the introduction) embrace, by way of example, the right to human dignity, bodily integrity, protection of private communication and the right to equal treatment.

At the same time, a review clause was inserted in Article 30, the second paragraph of which provides that the status of the conflict regulation of non-contractual obligations arising out of violations of privacy and rights relating to personality shall be reconsidered: "[n]ot later than 31 December 2008, the Commission shall submit (…) a study on the situation in the field of the law applicable to non-contractual obligations arising out of violations of privacy and rights relating to personality".

The Commission's Initial Proposal[88], in Article 6, specifically dealt with violations of privacy and rights relating to personality.

> 1. The law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality shall be the law of the forum where the application of the law designated by Article 3 would be contrary to the fundamental principles of the forum as regards freedom of expression and information.
> 2. The law applicable to the right of reply or equivalent measures shall be the law of the country in which the broadcaster or publisher has its habitual residence.

280 The above provisions essentially intended to extend the application of the general rule of *lex loci damni* to violations of privacy and rights relating to personality, introducing certain corrections warranted by the peculiarities of these matters. The general principle of *lex loci damni*, in libel cases, would normally mean that the law of the injured person would be applied. As defamation cases are about harm caused to reputation, the victim almost always suffers some harm in the country of his habitual residence. Furthermore, in such cases the chain of causality may also lead to a 'third country', different from the publisher's seat and the victim's habitual residence. By way of example, in *Shevill* the plaintiff claimed to have suffered damages in England (place of her domicile); nevertheless, she could have also instituted a proceeding in Belgium in order to claim compensation for the injury she suffered there (assuming that the *France-Soir* is distributed here as well); under the place of destination principle this claim would have been governed by Belgian law.

The Commission was influenced by the ECJ's judgments under the Brussels I Regulation, especially by *Shevill*.[89] The Commission suggests that the foregoing jurisprudence entails that the applicable law should be determined on a 'distributive basis'.

> [I]f the victim decides to bring the action in a court in a State where the publication is distributed, that court will apply its own law to the damage sustained in that State. But if the victim brings the action in the court for the place where the publisher is headquartered, that court will have jurisdiction to rule on the entire claim for damages:

[86] Amended proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations ("Rome II"). COM(2006) 83 final (hereafter: Amended Proposal)
[87] Amended Proposal, 6. (reaction to Amendment 57)
[88] Proposal for a European Parliament and Council regulation on the law applicable to non-contractual obligations ("Rome II"). COM (2003) 427 final (hereafter: Initial Proposal)
[89] ChJ Kunke, "Rome II and defamation: will the tail wag the dog?" (2005) 19 *Emory International Law Review* 1733, 1744; A Warshaw, "Uncertainty from abroad: Rome II and the choice of law for defamation claims" (2006) 32 *Brooklyn Journal of International Law* 269, 280-281 and 282.

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> the lex fori will then govern the damage sustained in that country and the court will apply the laws involved on a distributive basis if the victim also claims compensation for damage sustained in other States.[90]

Accordingly, the general approach leads to the law of the place where the publication is distributed, including principally the law of the victim's habitual residence. A defamatory content may entail detrimental effects only if it appears (is published) in the country concerned.

Nonetheless, the existence of reputation in the country concerned does not seem to be a necessary pre-requisite of applying the law of this country. Although it could be argued that defamatory allegations concerning an unknown or almost unknown person cause no harm as the evil of such violations relies in affecting the opinion of 'others' (a circumstance certainly not met if the victim has no reputation in the country), the publication may make the victim known in the country concerned or violate privacy without damaging reputation. It is a question of substantive law whether the victim may claim to have suffered injury in a country where he was previously not known. ***281** Furthermore, the applicable law may not require the plaintiff to prove that he actually suffered loss: the proof of the violation of the personality right may automatically trigger the right to compensation.[91] This, again, suggests that the relevance of the question of reputation comes under the applicable substantive law.

Furthermore, in defamation matters the phenomenon of 'hearsay' may also raise questions of interpretation. Assume that defamatory content about a Hungarian businessman is published in an English newspaper. Although this newspaper is not read by Hungarian customers, a Hungarian periodical subsequently takes this content from the English source. May one say that there is a causal link between the publisher's conduct and the Hungarian businessman's harm? Although from a substantive law point of view this linkage may be relevant, the Rome II Regulation defines *damnum* in terms of direct or most direct damage. In the foregoing case, the Hungarian businessman has probably already suffered damage in England (provided he has reputation there), hence, this is the place of direct damage; the harm suffered in Hungary was only an indirect consequence.

The Commission's Initial Proposal withdrew two questions from the ambit of the *lex loci damni*. First, there was a fear that the courts at the publisher's headquarters (if the action rests on general jurisdiction) would be obliged, on the basis of the law of the victim's habitual residence, to condemn conduct perfectly in conformity with the *lex fori*, and this could lead to public policy concerns, taking into account the delicate nature of the constitutional law treatment of human dignity and freedom of expression. Nevertheless, this special public policy clause seems to be redundant, since it adds nothing to the forum's already existing right to refuse to apply the foreign law if the latter were contrary to its public policy. Second, the Commission considered that legal certainty for the press justifies that the "the right of reply or equivalent measures" should be subject to a single law and this should be "the law of the country in which the broadcaster or publisher has its habitual residence." Otherwise, on the basis of the *lex loci damni*, multiple laws would be applicable to the right of reply, leading to the situation that the victim could exercise the most favourable treatment afforded by any of the laws concerned. In case of a ZDF broadcast concerning a celebrity this would, in fact, mean that the right of reply exists if it exists in any Member State law (and even more widely: in the law of any country where ZDF is broadcasted).[92]

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[90] Initial Proposal, 18.
[91] See *supra* n 35.
[92] P Stone, *EU Private International Law* (1st ed, Cheltenham, Edward Elgar, 2006) 367-368 (The rationale for Article 6(2) appears to be the impracticability of the distributive application to these issues of several laws under Article 3, and the inappropriateness of a reference to the law of the forum by analogy with Article 6(1).)

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282 The Commission's Initial Proposal triggered extensive negative lobbying by the media. The principle of *lex loci damni* may lead to the application of different laws on a 'distributive basis', or at least to the application of a law different from the law at the publisher's head office or editorial headquarters. Although this law may be either more favourable or more stringent for the media, the result of the application of the *lex loci damni* is less predictable and calculable, and this uncertainty leads to a situation where the media cannot predict which laws are to be complied with; or if this prediction is possible, the publisher may be subject to the rules of numerous laws, which may easily have conflicting provisions. The lack of foreseeablity and the problem of conflicting defamation laws pose considerable burdens on the media.

Incited by the media's harsh criticism, the European Parliament rejected the Commission's *lex loci damni* approach and envisaged restricting the range of laws that could govern claims emerging from the violation of privacy and personality rights to a single law, and shepherded the applicable law in the direction of the publisher's or broadcaster's country.

The Parliament adopted the following proposal in Article 5 of its position.

> 1. As regards the law applicable to a non-contractual obligation arising out of a violation of privacy or rights relating to the personality, the law of the country in which the most significant element or elements of the loss or damage occur or are likely to occur shall be applicable.
> Where the violation is caused by the publication of printed matter or by a broadcast, the country in which the most significant element or elements of the damage occur or are likely to occur shall be deemed to be the country to which the publication or broadcasting service is principally directed or, if this is not apparent, the country in which editorial control is exercised, and that country's law shall be applicable. The country to which the publication or broadcast is directed shall be determined in particular by the language of the publication or broadcast or by sales or audience size in a given country as a proportion of total sales or audience size or by a combination of those factors.
> This provision shall apply mutatis mutandis to publications via the Internet and other electronic networks.
> 2. The law applicable to the right of reply or equivalent measures and to any preventive measures or prohibitory injunctions against a publisher or broadcaster regarding the content of a publication or broadcast shall be the law of the country in which the publisher or broadcaster has its habitual residence.
> 3. Paragraph 2 shall also apply to a violation of privacy or of rights relating to the personality resulting from the handling of personal data.

The Parliament's proposal proceeds from the elusive principle of 'most significant elements of the loss'. In order to counter-balance the uncertainty related to this notion, the Parliament's position introduces presumptions for violations committed by the printed press, broadcast (radio and television) and electronic ***283*** media (especially the Internet). Nevertheless, these presumptions point to the law of the alleged tortfeasor.

First, "the country to which the publication or broadcasting service is principally directed" shall be deemed to be the one where the 'most significant elements of the loss' occur. The language of Article 5 is guarded but clear: it consistently speaks about 'the' country. Furthermore, the term 'principally directed to' also strengthens the proposition that it is about a single country: a publication's or a broadcast's principal direction can relate only to one country. In terms of practice, the phrase "to which the publication or broadcasting service is principally directed" implies the publisher's law (law of origin).

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Second, the presumption embedded in Article 5(1) seems to be irrebuttable: the first sentence of Article 5(1) subparagraph 1 ends with the command that “that country’s law shall be applicable”.

Third, if the country the publication is principally directed to cannot be established (“this is not apparent”), the place of the editorial control determines the applicable law (“the country in which editorial control is exercised”).

Subsequently, the Commission submitted a modified legislative proposal, the text of which shows that the fundamental divergence between the two texts deterred the Commission from going on with the issue. The Commission considered that the Parliament’s position

> would change the substance of the rule applicable to violations of privacy, particularly by the press. The Commission cannot accept this amendment, which is too generous to press editors rather than the victim of alleged defamation in the press and does not reflect the solution taken by a large majority of Member States. Since it is not possible to reconcile the Council’s text and the text adopted by Parliament at first reading, the Commission considers that the best solution to this controversial question is to exclude all press offences and the like from the proposal and delete Article 6 of the original proposal. Other privacy violations would be covered by Article 5 [i.e. the general rules].

2.The choice-of-law problems of violations of privacy and rights relating to the personality

When determining the choice-of-law rules applicable to violations of privacy and rights relating to personality, the basic tension lies between the approach (advocated by the European Parliament) favouring the law of origin (the law of the publisher, broadcaster, content provider) and the approach favouring the *lex loci damni* (law of destination), which embraces, among others, the victim’s place of domicile (but it may cover several other countries where the publication is distributed or accessed).[93]

284 The logic and fundamental principles of the Rome II Regulation suggest, as advocated also by the Commission, that the latter approach should be adopted (law of destination). The EU legislator has already made a decision on the general choice-of-law rules applicable to delicts and torts; although special rules are applicable to particular wrongs, these provisions either concretise the general rules of the *lex loci damni* principle, or establish exceptions justified by special considerations applicable to particular cases or issues. Nevertheless, exceptions are warranted only if the special considerations are compelling, since the general policy decision has already been cast by the legislator. This is the legislative context to be taken into account.

Accordingly, the first question is why should the law depart from the principle of *lex loci damni*? First, this principle subjects the publisher to different, potentially conflicting, laws. One cannot assume that the law where the loss occurs is more favourable to the victim or *vice versa*; these laws can be either more favourable or more hostile. Nonetheless, one thing remains certain: these laws may conflict with each other; while one practice may be lawful under the first law, it may amount to a blatant violation under the second. The consequence of this situation is characterized by the implicit spill-over effects of the different national laws, where the publisher is compelled to comply with different, potentially conflicting, legal regimes. The result is that the publisher is expected to conform to the ‘highest common factor’ of the legal systems concerned. Second, even if the publisher is

[93] See e.g. G Smith, “Here, there or everywhere? Cross-border liability on the internet” (2007) *Computer and Telecommunications Law Review* 41, 41-42.

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ready in principle to so comply, it may not be in the position to identify these legal systems. It may lack factual information about where the victim has a reputation and, hence, harm can be expected; moreover, in the mass media it is rather impracticable, though theoretically possible, to carry out a survey on where the persons affected by the content may have a reputation. Assume that the BBC broadcasts false news about an American celebrity: does this mean that the broadcaster is expected to comply with dozens of laws?

Notwithstanding the above objections, there are two very strong arguments against the principle that the law of the publisher (country of origin) should prevail. First, as suggested by the Rome II Regulation, potential victims have a right of 'no interference'. The most important message of the principle of *lex loci damni* is that delictual liability is mainly about the injured person's legitimate expectations of not being harmed. Delictual liability is, for the most part, not a strictly moral category: the relevant question is not whether the conduct (or omission) is detestable (a question certainly to be answered on the basis of the *lex loci delicti commissi*) but whether the victim had the right to 'no interference' with his situation. Now then, if delictual liability is not about the wrongdoer's sin but about the victim's rights, there is a compelling argument against applying the law of the publisher. Although the *lex loci damni* certainly complicates the picture in cases where damages emerge in ***285** different countries, the question is whether the desire for simplification should frustrate normative rights.

The second objection against the publisher's law is that in such cases the publisher could manipulate the applicable law. Practically, it is only the publisher that can, with its own facts, influence which law is applicable to the matter, although this can only be done before the defamation is committed. One cannot assume automatically that the publisher's law is less favourable to the victim than the *lex loci damni*. Nevertheless, it can be assumed that the publisher has the chance, by selecting the country where the editorial control is exercised or the periodical is first published, to 'choose' the law that is the least favourable to the potential victims.

The discussion of the conflict regulation of violations of privacy and rights related to personality requires some modesty on the side of the researcher. First of all, one has to acquaint oneself with the circumstance that there is no perfect solution; hence, the ambition to find the perfect solution should, instead, be converted to an endeavour to find the second-best but real solution. The reason behind this pessimism is simple: words know no borders.[94] Content displayed (published, broadcasted etc.) in one country may inevitably have spill-over effects in another country. Although this spill-over effect has always been present, the Internet magnifies this phenomenon. A perfect example is the famous *Yahoo* case, where the content displayed on the website was, as far as possible, illegal under French law (it was not simply illegal, it was covered by criminal law), while it was, as far as possible, lawful under US law (it was not just not prohibited, but rather concerned a right protected by the US Constitution). The case presented a perfect stalemate. If the French prohibition prevailed, this would amount to the exportation of French law to US soil; on the other hand, if the US approach prevailed, this would mean that US law is exported to France. Since the Internet knows no borders this tension cannot be resolved. While Yahoo lost in France (i.e. it was found guilty),[95] the US court was fast in declaring that this French judgment is not recognisable and enforceable in the US as it is contrary to the First Amendment of the Constitution.[96]

[94] See TC Hartley, "'Libel tourism' and conflict of laws" (2010) 59 *International and Comparative Law Quarterly* 25, 31 ("In the realm of information, the world is one unit: individual countries cannot be isolated from the rest.")

[95] TGI Paris 20 nov. 2000, JCP 2000, Act, p. 2214)

[96] *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme,* 145 F.Supp.2d 1168, 1180 (N.D.Cal.2001) (Establishing personal jurisdiction.); *Yahoo!, Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme,* 169 F.Supp.2d 1181, 1194 (N.D.Cal.2001) (Declaring that "the First Amendment precludes enforcement within the

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**286* Accordingly, the law should content itself with the second-best solution. What is the, probably most important, expectation such a second-best solution is to meet? The requirement of foreseeability suggests that the parties should be in the position to foresee which law will be applicable to their case. The place of destination approach (*lex loci damni*) meets this requirement in respect of the victim: he can expect that his reputation will be protected according to the law of the country where he has a reputation. On the other hand, the publisher may not foresee in which countries the damages occur, and the muster of the potentially applicable laws may be very burdensome. This uncertainty emerges from a question of fact: although the publisher may know where the publication is distributed, it may not know where the person concerned has a reputation. Furthermore, if the person concerned is known in numerous countries, the legal analysis to be done before the content is published (or broadcasted) should cover several legal systems.

The rule of origin has the same merits and drawbacks in terms of foreseeability as the rule of destination (*lex loci damni*), with the difference that it shifts the burden onto the victim. If the rule of origin is followed, the publisher would naturally be in the position to predict the applicable law as this would be the one applicable at the seat (headquarters or place of editorial control) of the publisher. Nevertheless, the victim suffering from a defamatory content could not predict under which law he would get protection: this could be the law of any country.

While foreseeability is part of conflicts justice, none of the basic approaches can meet this requirement completely. It would seem to be odd to argue that foreseeability for the victim is less important than predictability for the press. Moreover, it seems that the rule of destination serves the purpose of foreseeability more than the rule of origin. While the victim cannot predict from which origin defamatory content might appear, and, hence, he cannot predict the applicable law *a priori* (before the defamation occurs), the publisher is aware of the content to be published and can do the conflicts analysis prior to publication. Although this may amount to a burdensome assignment and it is a reasonable expectation on the side of the publisher that not all laws where some detriment emerges should be applied, the rule of destination serves the purpose of foreseeability to the widest possible extent. At the same time, it is to be stressed that in the application of the *lex loci damni* the *damnum* should be confined to substantial damages, i.e. 'some' loss should not suffice.

One of the most important arguments against the *lex loci damni* approach is that it enables the alleged victim to institute vexatious suits against the publisher. This objection is, nevertheless, misplaced: vexatious trials are due to the **287* rules on jurisdiction and not to

United States."); on appeal: *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, L'Union Des Etudiants Juifs De France*, 433 F.3d 1199 (2006) (Remanding for lack of ripeness and lack of personal jurisdiction.); the Supreme Court denied certiorari in Order No 05-1302. In August 2010, the Securing the Protection of our Enduring and Established Constitutional Heritage Act (SPEECH Act), P.L. 111-223, codified at 28 U.S.C. §§ 4101-4105, was adopted, which mandates US courts not to recognize foreign libel judgments if the foreign substantive libel law or procedure is inconsistent with the US Constitution (First Amendment) or Section 230 of the Communications Act of 1934 (47 U.S.C. § 230). See E C Barbour, "The SPEECH Act: The Federal Response to 'Libel Tourism'" (*Congressional Research Service* 7-5700, 16 September 2010): http://www.fas.org/sgp/crs/misc/R41417.pdf; R Balin, L Handman & E Reid, "Libel tourism and the duke's manservant" (2009) (3) *European Human Rights Law Review* 303, 326-328; L Levi, "The Problem of Trans-National Libel" (March 25, 2011). *University of Miami Legal Studies Research Paper No. 2011-11*. 26-42. Forthcoming in *American Journal of Comparative Law*. Available at http://ssrn.com/abstract=1795237. J-J Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights" (2011) 12(8) *German Law Journal* 1681, 1691-1692. On the recognition practice of US courts see R L McFarland, "Please Do Not Publish this Article in England: A Jurisdictional Response to Libel Tourism" (November 28, 2009). 29-38. Published in (2010) 79 *Mississippi Law Journal* 617. Available at SSRN: http://ssrn.com/abstract=1514988; R Balin, L Handman & E Reid, "Libel tourism and the duke's manservant" (2009) (3) *European Human Rights Law Review* 303, 320-326; J-J Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights" (2011) 12(8) *German Law Journal* 1681, 1691.

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conflicts provisions.[97] Although several matters used as examples for forum shopping were led by the desire to have the most favourable law applied, these were, without exception, global matters, exploiting mainly the differences between English and US law; in Europe the differences between national laws are not so huge (although it is true that in practice a difference is always significant if it helps to win the case). Moreover, the expected introduction of uniform conflict rules (in the Rome II Regulation) would make the striving for the better law mainly needless (although it is undeniable that whereas uniform law would be applied, different national judges may tend to follow different interpretations and be attracted to diverging value judgments). Hence, it is assumed that, within the EU, the reason for forum shopping would be limited to the desire to compel a law-suit in a country that is inconvenient for the defendant.

3.The CJEU's judgment in *eDate/Martinez*: the triumph of the principle of country of origin

The CJEU's ruling in *eDate/Martinez*[98] intruded into the above learned discourse on the question of applicable law,[99] and did away with the riddle of choice of law, without actually solving it. The judgment interpreted Article 3 of the E-Commerce Directive[100] and, put at its simplest, ruled that, in principle, the law of the Member State where the service provider is established (provided it is established in the EU) is to be applied if it is more favourable to the service provider.

The Court's interpretation was heavily impregnated by the objective of the internal market[101] and this goal seems to have swept it off the delicate thinking of conflicts law. Albeit the Directive's provisions are self-contradictory, the clear purpose-setting helped the Court to overcome the anomalies of textual interpretation. On the one hand, Article 1(4) of the Directive provides that the "Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts."[102] On the other hand, the ***288** Directive also provides, as concisely summarized by Recital 23, that "the provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive." Article 3(2) of the Directive provides that "Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State." The coordinated field covers private law, including the liability of the provider of information society services,[103] and all measures qualify as a restriction that discourage the cross-border provision of the information society service. It amounts to such a discouragement if the service provider has to comply with stricter rules than in its country of establishment.

[97] See J-J Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights" (2011) 12(8) *German Law Journal* 1681, 1683 & 1686-1687.

[98] See *supra* n 10.

[99] It is to be noted that the Court's interpretation did not come as a complete surprise. For a forerunner of the ECJ's construction of Article 3 of the E-Commerce Directive see G Spindler, "Herkunftslandprinzip und Kollisionsrecht - Binnenmarktintegration ohne Harmonisierung? Die Folgen der Richtlinie im elektronischen Geschäftsverkehr für das Kollisionsrecht", (2002) 66 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 633, 691 (Contending that the country of origin principle under the E-Commerce Directive covers, in principle, all communication delicts.)

[100] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2000] OJ L 178/1.

[101] Article 1(1) of the E-Commerce Directive.

[102] See para 60.

[103] Para 58.

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The CJEU lifted this textual contradiction along the objective of the free movement of services and gave precedence to the requirement not to discourage service providers in any respect. The CJEU held that the free movement of services is not fully guaranteed

> if the service providers must ultimately comply, in the host Member State, with stricter requirements than those applicable to them in the Member State in which they are established. (…) Article 3 of the Directive precludes, subject to derogations authorised in accordance with the conditions set out in Article 3(4), a provider of an electronic commerce service from being made subject to stricter requirements than those provided for by the substantive law in force in the Member State in which that service provider is established.[104]

Taking the above into account, the CJEU's insistence that it is not intruding into the domain of conflict of laws may come as a surprise. The Court's remark in paragraph 63, stating that "Article 3(2) of the Directive does not require transposition in the form of a specific conflict-of-laws rule", seems to be hypocrital, at least;[105] the ruling actually entails that Member States are free to apply any law to the service provider, as long as this law is not more disadvantageous to it than the law of its establishment. This ruling does not grant more freedom to Member States than Henry Ford's famous words did ***289** to customers: "[a]ny customer can have a car painted any color that he wants so long as it is black."[106]

The point that the judgment does not establish a choice-of-law rule is inconceivable.[107] Choice-of-law rules determine the applicable law. Some of them are not independent but attached to another conflicts norm and have a corrective function. This corrective role may lie in providing for the application of the law more favourable to the child or to the injured person, or in providing that even if the contract were formally invalid under the *lex causae*, it is to be regarded as valid if it is not formally void under the law pointed to by the corrective choice-of-law rule (e.g. *lex loci actus*). The CJEU's ruling in *eDate/Martinez* may be grasped in private international law language as follows: Member States may use any connecting factor they wish but the law of the Member State where the service provider is established is to be applied if this is more favourable to the service provider. Taking this into account, it seems to be, indeed, odd to contend that the ruling does not affect private international law: if it affects a branch of law, it is private international law.

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[104] Paras 66-67.

[105] See R Michaels, "EU law as private international law? Reconceptualising the country-of-origin principle as vested-rights theory" (2006) 2 *Journal of Private International Law* 195, 202. On the debate whether Article 3 contains a genuine choice-of-law rule see e.g. P Mankowski, "Das Herkunftslandprinzip als Internationales Privatrecht der e-commerce-Richtlinie" (2001) 100 *Zeitschrift für vergleichende Rechtswissenschaft* 137; S Crundmann, "Das Internationale Privatrecht der E-Commerce-Richtlinie – was ist kategorial anders im Kollisionsrecht des Binnenmarkts und warum?" (2003) 67 *Rabels Zeitschrift für ausländisches und internationals Privatrecht* 246; G de Baere, "'Is this a Conflict Rule which I see Before Me?' Looking for a Hidden Conflict Rule in the Principle of Origin as Implemented in Primary European Community Law and in the Directive on Electronic Commerce" (2004) 11 *Maastricht Journal of European and Comparative Law* 287, 305-17.

[106] Henry Ford, published in his autobiography *My Life and Work* (New York, Doubleday, 1922), Chapter IV, 71-72.

[107] See G Spindler, "Herkunftslandprinzip und Kollisionsrecht - Binnenmarktintegration ohne Harmonisierung? Die Folgen der Richtlinie im elektronischen Geschäftsverkehr für das Kollisionsrecht", (2002) 66 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 633, 665 (Contending that that the country of origin principle influences and is super-imposed over choice-of-law, and functions like a choice-of-law principle.); M Hellner, "The country of origin principle in the E-commerce Directive: A conflict with conflict of laws?" (*RGSL Working Papers No. 6*, Riga 2003) 15-17 & 26: http://www.rgsl.edu.lv/images/stories/publications/RWP6Hellner.pdf. Published in *Les conflits de lois et le système juridique communautaire* (2004) 205.

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An alternative explanation could be that the Directive and the ruling introduce a 'corrective at a substantive level';[108] that is, the principle that the service provider must not be subjected to rules stricter than the ones included in the law of its establishment comes up only after the choice-of-law exercise has been done and the applicable law has been found. Nonetheless, this explanation is like an iron ring made of wood – it is self-contradictory: a norm that determines whether and to what extent to apply a foreign (private) law is a choice-of-law norm. This norm does not become a substantive rule simply because conceptually it is alleged to be applied after the law that is in principle applicable has been found. Corrective choice-of-law norms are traditional members of the private international law club. It may not come as a surprise that the Advocate General's Opinion expressly rejected the 'corrective at a substantive level' approach.[109]

The above anomaly is not new in EU law. A similar process passed off as to the personal law of companies, where the freedom of establishment swept the rivalry between the principle of incorporation and the principle of real seat away. This saga is very telling as to repercussions of *eDate/Martinez*. The CJEU advanced also here that it does not intrude into the domain of private inter***290***national law, but in fact the country of origin principle, obviously and cruelly, devoured the choice-of-law problem. The message of this case-law is (referring back to Henry Ford's famous words quoted above) that Member States may adopt any approach as to the determination of the personal law of companies, so long as it is the incorporation theory.

In these cases, the CJEU expressly refused to intimate expectations as to choice-of-law rules; on the other hand, it was very categorical as to the plights it cannot tolerate:[110] while conflicts rules on the personal law of companies come obviously under the legislative competence of the Member States, EU law cannot tolerate plights where a company lawfully founded in one Member State cannot or is discouraged from exercising the freedom of establishment, whatever conflicts reasoning backs this conclusion.

In *Centros*[111] a Danish couple (both Danish nationals residing in Denmark) established a private limited company in England in order to avoid the burdensome Danish rules on company formation, especially the minimum capital requirement[112]. The ECJ held that a Member State has no power to question another Member State's decision to grant legal personality to an organisation.[113]

The controversy in *Überseering*[114] concerned the nucleus of the tension between free movement law and choice-of-law rules. Überseering was a Dutch company founded in the Netherlands, the shares of which were acquired by German citizens and the company's place of central management moved to Germany. In a law-suit, Überseering's legal capacity was

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[108] See G Spindler, "Herkunftslandprinzip und Kollisionsrecht - Binnenmarktintegration ohne Harmonisierung? Die Folgen der Richtlinie im elektronischen Geschäftsverkehr für das Kollisionsrecht" (2002) 66 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 633, 649-654.

[109] Para 82.

[110] See R Michaels, "EU law as private international law? Reconceptualising the country-of-origin principle as vested-rights theory" (2006) 2 *Journal of Private International Law* 195, 205.

[111] Case C-212/97 *Centros Ltd v Erhvervs- og Selskabsstyrelsen* [1999] ECR I-1459. *See* Case 79/85 *D. H. M. Segers v Bestuur van de Bedrijfsvereniging voor Bank- en Verzekeringswezen, Groothandel en Vrije Beroepen* [1986] ECR 2375.

[112] It was common ground that the mail-box company established in England was meant to operate exclusively in Denmark, without any activity in England. The complications arose when the company tried to register a branch in Denmark: its application was refused on the ground that the founders strove to circumvent the Danish national rules on minimum capital. Para 7.

[113] Para 39.

[114] Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* (NCC) [2002] ECR I-9919.

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questioned.[115] The argument was structured as follows. The forum shall apply its own choice-of-law rules; according to the German rules personal law, including the question of legal capacity, was determined by the real seat principle; once the real seat ***291** moved to Germany, the applicable law changed to German law. Consequently, Überseering was expected to comply with the requirements of German company law, including the requirement of registration in Germany, which it, as a company with Dutch 'identity', neglected. Since Überseering did not meet the pre-conditions of legal personality laid down by German law (requirement of registration in Germany), it lacked legal personality and, as such, it had no legal capacity. The ECJ held that "[w]here a company formed in accordance with the law of a Member State ('A') in which it has its registered office exercises its freedom of establishment in another Member State ('B'), Articles 43 EC and 48 EC [now Article 49 and 54 TFEU] require Member State B to recognise the legal capacity and, consequently, the capacity to be a party to legal proceedings which the company enjoys under the law of its State of incorporation ('A')."[116]

Until this point it was certain that the freedom of establishment implies that once a company has been incorporated in one of the Member States, it is to be automatically and unconditionally recognized in all the other Member States. In choice-of-law terms: if a company has legal personality under the law of incorporation, this may not be questioned even if this legal personality were missing under the law of the real seat. At the same moment, one may have hoped that the law of the real seat may be applied unexceptionally to all other questions of personal law. However, the ECJ's ruling in *Inspire Art* removed these hopes. In this case the Netherlands adopted a special piece of legislation for pseudo-foreign companies. While companies founded in another country were governed by the law of incorporation, if all the relevant connections bound them to the Netherlands, they were subjected to special rules: for instance, the minimum capital requirement of Dutch law applied and the directors had joint and several liability if the company did not comply with the foregoing Dutch rules. The CJEU held that the special rules of Dutch law applicable to 'formally foreign companies' hinder the freedom of establishment because they may discourage companies lawfully founded in one of the Member States from establishing a branch or other operation in another Member State.[117]

The above provisions of Dutch law could be conceptualized with choice-of-law terms as follows: the law applicable to the personal status of the company was the law of incorporation, while the imperative rules of the forum overrode some of the norms of the *lex causae*. Nonetheless, the CJEU held that, due to the freedom of establishment, the forum may not give precedence to its imperative norms.

***292** In sum, the above judicial practice suggests that the law of incorporation shall be applied if it is more favourable to the company or its directors; the same approach that was adopted by the CJEU in *eDate/Martinez*. The question emerges, though: if the law of the seat, notwithstanding its imperative character, cannot be applied once it is more burdensome to the company or its directors than the law of incorporation, what remains in its purview? Hypocritically, one may deny that the CJEU did take a position as to the connecting factor to be adopted in private international law (as far as EU-matters are concerned, of course);

[115] In this law-suit, Überseering sued because of defective performance and the defendant raised the argument that Überseering is non-existent, as it does not meet the conditions its personal law raises for having legal personality; consequently, it has no legal personality (i.e. it is not a legal subject) and as such cannot be party to a legal procedure. For more detail on the CJEU case law on free movement of companies in the EU and the limits of what can be achieved on the law governing companies in the absence of EU legislative harmonisation see J Borg-Barthet, "A New Approach to the Governing Law of Companies in the EU: A Legislative Proposal" (2010) 6 *Journal of Private International Law* 589 and *The Governing Law of Companies* (Oxford, Hart, 2012).
[116] Answer to question 2.
[117] Paras 99-101, 143 and answer to question 2.

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however, that would disregard the realities. The aftermath of the case-law on the personal law of companies shows that the principle of real seat was, in fact, replaced by the principle of incorporation: the supreme courts of Austria and Germany, the two citadels of the 'real seat' theory, moved towards the principle of incorporation.[118]

In line with the saga of the personal law of companies, the CJEU's judgment in *eDate/Martinez* entails that the law pointed to by the choice-of-law rules of the forum may be applied to online communication delicts but the law of the service provider's establishment is to be applied if this is more favourable to the service provider and the service provider is established within the EU.

This ruling does not provide a comprehensive and uniform solution. First, the *eDate/Martinez* judgment implies that the law applicable to a communication may depend on which communication channel (or communication means) is used. Article 3(2) of the E-Commerce Directive, as interpreted in *eDate/Martinez*, provides that online communication originating from an EU Member State is subject to the law of the country of origin, provided this is more favourable to the service provider. The law governing contents that appear in the printed media is determined by the national choice-of-law rules. The status of audiovisual communication is dubious. The Audiovisual Media Services Directive[119] also follows the country of origin principle, however, it is not clear whether the private law aspects of communication delicts are covered by the Directive's coordinated field.[120] This trifurcation of the applicable law is highly unfortunate, taking into account that the same content may be communicated through different channels; often, online communication may be complementary to printed ***293** and audiovisual communication: an article published in a printed newspaper may appear in the newspaper's online edition, the broadcasted information may appear on the television station's website. Second, the *eDate/Martinez* ruling is applicable solely to service providers established in one of the Member States; non-EU providers of information society services do not come under the scope of the E-Commerce Directive;[121] hence, the ruling does not interfere with how the law applicable to their communication delicts is determined.[122]

4.Proposals

It would not be completely fair to blame the ECJ for all the flaws emerging from the country-of-origin principle. As a distinguished scholar conceived it in exquisite terms: "[t]he version of the country of origin principle contained in Article 3 (…) of the E-commerce Directive – in combination with the fuzzy concept of the 'coordinated field' in Article 2(h) – should never

[118] For Austria see Case 6Ob124/99z OGH (Austria), decision of 15 July 1999. For a case-note see (1999) *Österreichisches Recht der Wirtschaft* 719. See also Ch Nowotny, "OGH anerkennt Niederlassungsfreiheit für EU-/EWR-Gesellschaften. Die. Centros-Entscheidung des EuGH zwingt zur Abkehr von der Sitztheorie" (1999) *Österreichisches Recht der Wirtschaft* 697. For Germany see Case II ZR 5/03 BGH (Germany), decision of 14 March 2005. For a case-note see (2005) *Neue Juristische Wochenschrift* 1648. See also W Goette, "Zu den Folgen der Anerkennung ausländischer Gesellschaften mit tatsächlichem Sitz im Inland für die Haftung ihrer Gesellschafter und Organe", (2006) 27 *Zeitschrift für Wirtschaftsrecht* 541-546.

[119] Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities [1989] OJ L 298/23.

[120] Article 2a(1). See J-J Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights", (2011) 12(8) *German Law Journal* 1681, 1694.

[121] Article 1.

[122] See J-J Kuipers, "Towards a European Approach in the Cross-Border Infringement of Personality Rights" (2011) 12(8) *German Law Journal* 1681, 1693.

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have been adopted. It extends the meaning of the principle in a manner which is not entirely thought through."[123]

Although the hands of the ECJ were textually indeed bound, the Directive's language would have enabled the careful analysis of the conflicts problems of online communication delicts and the mitigation of the detrimental consequences of the country-of-origin principle; for instance, the Court could have attached at least some relevance to the Directive's categorical declaration that it does not establish conflicts rules.[124] Nonetheless, however that may be, Article 3(2) as applied in *eDate/Martinez* should be re-considered and overruled. Namely, the country-of-origin principle, as applied in *eDate/Martinez*, is highly over-simplified and fails to provide a comprehensive solution to the problem of communication delicts, as it is not applicable to non-online matters (printed media, broadcasting) and to cases where the provider of the information society services is established outside the EU. On the other hand, EU choice-of-law rules have universal application, which is restricted neither sectorally, nor territorially.[125] Hence, today there is even a greater need of a distinguished scholarly dialogue, which endeavours to carefully disentangle the problems of communication delicts instead of quickly doing away with them.

The rules of privacy and personality rights are mainly conduct-regulating (and not risk-allocating), in some countries these violations are also punished through criminal law; hence, contrary to the over-simplification of *eDate/***294**Martinez*, the application of the principle of territoriality on a 'distributive' basis would be warranted. Furthermore, the Rome II Regulation also made a clear policy choice when opting for the *lex loci damni*: the starting point for conflicts law is not that the delict is evil but that the victim has a right to 'no interference' with his status. This protection of rights logic is valid in respect of personality rights, where prohibitions stem from rights and not the other way around. The question is how to reconcile the principle of destination with the interests of the publishers; of course, it cannot be assumed that the destination rule leads to a law that is less (or more) favourable to the publisher than any alternative rule. Publishers may have legitimate objections against the destination principle. First, it does not meet the requirement of foreseeability; second, this approach may subject them to numerous (potentially conflicting) regimes. It is submitted that the latter is inherent in going transnational (or international); as far as substantive law is not harmonized, entities going international face the costly burden of 'multi-national' compliance. This is true both in industrial and cultural 'production'. Accordingly, only the requirement of foreseeability remains.

The final purpose of the choice-of-law rules is to find the law that is most closely connected to the matter or the subjective right allegedly violated. Although, as noted above, it is submitted that in trans-border libel matters there is no single law that could be regarded as being the most closely connected ('distributive' application of the law), the relevant question is still which law or laws have an adequately close connection to the matter or right in its integrity. At this phase, the existence and the extent of the harm cannot be established (actually, this is the question concerning which the applicable substantive law is looked for; hence, it is to be determined according to the *lex causae*). What can be investigated at this stage is the size of the publication's circulation and the victim's reputation in the given country.

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[123] M Hellner, "The country of origin principle in the E-commerce Directive: A conflict with conflict of laws?" (*RGSL Working Papers No. 6*, Riga 2003) 26: http://www.rgsl.edu.lv/images/stories/publications/RWP6Hellner.pdf. Published in *Les conflits de lois et le système juridique communautaire* (2004) 205.

[124] Article 1(4)

[125] See Article 2 of the Rome I Regulation, Article 3 of the Rome II Regulation, Article 4 of the Rome III Regulation

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The requirement of closest connection is fully met if the parties have their habitual residence in the same country. Article 4(2) of the Rome II Regulation contains an excellent rule for cases where the publisher and the alleged victim are domiciled (habitually resident) in the same country.

The real aversions against the principle of destination emerge when the publisher is subjected to the law of a 'side-effect' country, where the publication at stake has only a modest circulation, contrary to the country (or countries) of main direction. It seems to be obvious that publishers are expected to comply with the laws of the countries their publications are principally directed to. If the parties have their habitual residence in different countries and the law of one of the countries of main direction is applied (to the harm allegedly caused there), both the principle of destination and the requirement of foreseeability are met. Essentially, this is in compliance with the Parliament's proposal with the variation that in the latter *the country* that has to be established is the one to which the publication is principally directed, while according to ***295** this paper's proposal the publication's main direction may be to different *countries*.

A publication may be directed towards various countries. Europe has plenty of trans-border language regions. A French publication's main direction may easily cover also Belgium (Wallonia); a German publication may target, among others, Germany, Austria and the German language region of Belgium; likewise, the Hungarian language is widely spoken, among others, in Slovakia, Romania and Vojvodina (northern region of Serbia).

If harm (allegedly) emerges both in the country of main direction and in a side-effect country, the application of the law of the side-effect country to the loss allegedly emerged here is reasonable only if the harm in the side effect country is substantial on the basis of the size of the publication's circulation or the victim's reputation. The victim's domicile should be a very important factor in determining whether the harm in the side-effect country is substantial; it is assumed that this is the country where the victim has his widest reputation. Note that Ms Shevill resided for only three months in France, while being domiciled in England. In this case the application of English law is warranted, as in France she might not have been known at all. This approach reconciles the values of conflicts justice to the greatest possible extent; recalling that the purpose of the present enterprise, in the absence of a perfect solution, had to be restricted to finding the second-best solution. The publisher ought to foresee the application of the law of a country where it has substantial circulation or where the victim is widely known. Of course, it would be more convenient to disregard these laws but reconciling concurring values needs balanced compromises. The publisher's desire for foreseeability has to bow to the victim's right of 'no interference' only if the latter does have a substantial reputation in a country outside the publication's main direction.

The phenomenon of international celebrities poses additional problems for conflicts law. An international celebrity is known almost everywhere; hence, a defamatory content broadcasted or accessible globally may harm his reputation in numerous countries, granting a wide range of possibilities for the international celebrity in terms of jurisdiction and applicable law. The situations may differ on the basis whether the publisher and the 'victim' are domiciled in the same country or not. A typical scenario: a US celebrity (with a world-wide reputation) claims to be injured by a publication 'domiciled' in the US but distributed globally and sues in England. The perversity of this situation is blatant: a US plaintiff sues a US defendant in England on the basis of English law.[126] Nonetheless, the general principle of common domicile (habitual residence), as embedded in Article 4(2) of the Rome II Regulation, essentially ***296** solves this problem, albeit it may certainly be a cumbersome task

[126] See *Lewis v King* [2005] EMLR 4; [2004] EWCA Civ 1329.; R Garnett & M Richardson, "Libel tourism or just redress? Reconciling the (English) right to reputation with the (American) right to free speech in cross-border libel cases" (2009) 5 *Journal of Private International Law* 471, 476-477.

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to determine the celebrity's domicile. The second scenario is when the celebrity is domiciled in a country different from the seat of the publisher; or he is truly international without predominant ties to any particular country.[127] Here, the issue is not considerably different from the general question: while international celebrities should expect international criticism, publishers going international should count on the problem of 'global compliance'.

In sum, the law of the country coming under the publication's main 'direction' shall be applicable to the injury suffered there. The application of the law of a side-effect country is justified only if the harm sustained there is substantial; 'simple' harm should not suffice. Since the extent of the harm is a question to be answered on the basis of the applicable substantive law, two factors are to be examined: the publication's circulation and the victim's reputation. If the former is significant, the application of this law is warranted; if it is modest but the victim's reputation is significant here, the application of this law is also warranted. A presumption is to be applied in this regard: it is to be assumed that the alleged harm is substantial in the country where the victim has his habitual residence.[128]

[127] *Berezovsky v Michaels* [2000] 1 WLR 1004.

[128] Cf. T C Hartley, "'Libel tourism' and conflict of laws" (2010) 59 *International and Comparative Law Quarterly* 25, 34-35 (Examining the question of applicable law from an interest-analysis perspective.)

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